INDEX

	Page
Record on appeal to Court of Appeals of New York	1
Statement under Rule 234	1
Notice of appeal to Court of Appeals	2
Summons	2
Amended complaint	3
Answer to amended complaint	5
Bill of particulars	9
Further bill of particulars	11
Extract from clerk's minutes of trial	12
Judgment appealed from	12
Case and exceptions	13
Caption and appearances	13
Testimony of Frank Paul Filardo	14
Testimony of Bernard T. Ehret	37
Motion to amend complaint and allowance thereof	46
Motion to dismiss complaint	48
Testimony of Eugene W. Kortjohn	58
Ruling on motion to dismiss	75
Testimony of James C. Harris	75
Renewal of motion to dismiss	80
Motions for directed verdict	81
Denial of motions to dismiss and for a directed verdict	81
Stipulation as to time worked and compensation	82
Charge to jury	82
Request to charge	84
Verdict	85
Motion to set aside verdict and denial thereof	86
Colloquy re question of interest	86

Page

Plaintiff's exhibits:

1—Agreement of employment between Foley Bros., Inc., and Spencer, White & Prentis, Inc. 87

3—Paper dated June 10, 1943 95

4—Employment record 96

5—Certificate as to Bernard T. Ehret's employment 97

6—Stipulation dated November 18, 1946 98

Defendants' exhibits:

"A"—Employee's claim for work out of classification 101

"D"—Extension agreement, dated October 21, 1942 105

"E"—Stipulation dated February 27, 1945 and accompanying testimony 107

"F"—Time cards 115

Affidavit of no opinion 125

Stipulation as to exhibits 125

Stipulation settling case 126

Order settling and filing case 126

Stipulation waiving certification 126

Order filing record in Appellate Division 127

Plaintiff's notice of appeal to the Court of Appeals 127

Order appealed from—Appellate Division 128

Judgment appealed from 128

Opinion of the Appellate Division, Callahan, J. 129

Order to dispense with printing 131

Stipulation waiving certification to the Court of Appeals 132

Opinion of Court of Appeals, Fuld, J. 132

Remittitur of Court of Appeals 138

Order of Appellate Division upon reversal by Court of Appeals 140

Judgment of reversal by Appellate Division 141

Clerk's certificate [omitted in printing]

Order allowing certiorari 143

1 IN SUPREME COURT OF NEW YORK

Appellate Division—First Department

FRANK PAUL FILARDO, *Plaintiff-Respondent,*

—against—

FOLEY BROS., INC., and SPENCER, WHITE & PRENTIS, INC.,
Defendants-Appellants.

Statement Under Rule 234.

This action was commenced by the service of the summons upon the defendants on the 29th day of July, 1943.

The defendants appeared by their attorney, James R. McNally, United States Attorney for the Southern District of New York, on the 6th day of January, 1944, on which date an answer and demand for a bill of particulars were served on plaintiff's attorney.

The bill of particulars was served on the defendants' attorney on the 1st day of February, 1944, and thereafter, a further bill of particulars was served on the defendants' attorney on March 11, 1944.

The names of the original parties are stated in full above and there has been no change of parties since the action was begun. However, the defendants are now represented by John F. X. McGohey, United States Attorney for the Southern District of New York.

2 The trial was had on January 2 and 3, 1947, before the Honorable Edgar J. Nathan, and a jury of twelve, at Part IV, New York County Supreme Court, and resulted in a judgment in favor of the plaintiff for $2496.36, plus interest amounting to $650 and costs amounting to $181.60, making in all the sum of $3327.96.

Judgment was entered on the 9th day of January, 1947, in favor of the plaintiff and against the defendants in the amount of $3327.96.

3 In Supreme Court of New York
County of New York

FRANK PAUL FILARDO, *Plaintiff*,

—*v.*—

FOLEY BROS, INC., and SPENCER, WHITE & PRENTIS, INC.,
Defendants.

Notice of Appeal.

Sir:

PLEASE TAKE NOTICE, that Foley Bros., Inc., and Spencer, White & Prentis, Inc., the defendants in this action, hereby appeal to the Appellate Division of the Supreme Court for the First Judicial Department, from the final judgment of the Supreme Court entered herein in the office of the Clerk of the Supreme Court, New York County on the 8th day of January, 1947, whereby it was adjudged that said plaintiff recover of said defendants the sum of three thousand three hundred twenty-seven and 96/100 dollars ($3,327.96), and from each and every part of said judgment.
Dated: New York, N. Y., January 31, 1947.

4 Yours, etc.,

JOHN F. X. MCGOHEY,
United States Attorney for the
Southern District of New York,
Attorney for Defendants,
Office & P. O. Address:
United States Court House,
Foley Square,
New York 7, N. Y.

To:

CHESTER A. LESSLER, Esq.,
551 Fifth Avenue,
New York 17, N. Y.

---

5 In Supreme Court of New York
County of New York

Summons.

To the above named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or if the complaint is not

served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: July 29, 1943.

CHESTER A. LESSLER,
Attorney for Plaintiff,
Office & Post Office Address:
58 West 40th Street,
Borough of Manhattan,
City of New York.

---

6 In Supreme Court of New York.

Amended Complaint.

Plaintiff by his attorney, Chester A. Lessler, for an amended complaint complaining of the defendants, alleges as follows:

FOR A FIRST CAUSE OF ACTION:

1. Upon information and belief that at all times hereinafter mentioned, defendants were domestic corporations duly organized and existing under and by virtue of the laws of the State of New York, and engaged in the business of contracting for engineering, construction and building.

2. That upon information and belief that said defendants were engaged in a joint venture whereby said defendants agreed to construct for the United States Government and/or the War Department certain buildings, equipment and bases outside of the United States in the Near East, East, and/or other foreign places.

3. That on and between the 16th day of February, 1942, and the 10th day of June, 1943, the plaintiff did perform work, labor and services at the special instance and request of the defendants, at Ahwaz, Iran, as head cook on behalf of the aforesaid project, and that the reasonable value of plaintiff's services as head cook was in the sum of $75.00 per week.

4. That on the contrary, plaintiff received the sum of $60.00 per week from February 16 to August 7, 1942 inclusive and
7 $70.00 per week from August 7, 1942 to December 31, 1942 inclusive, and $69.00 per week from March 8, 1943 to June 10, 1943.

5. That by reason of the aforesaid, there is due to the plaintiff from the defendants the sum of $635.00, no part of which has been paid although duly payable and duly demanded.

FOR A SECOND CAUSE OF ACTION:

6. Plaintiff repeats, reiterates and realleges all the allegations set forth in paragraph "1" with the same force and effect as if fully set forth herein.

7. That upon information and belief the said defendants were joint contracting parties with the United States Government and/or the War Department of the United States Government and entered into a contract with the aforesaid dated November 10, 1941, No. DA-W 1098, Eng. 109, to build certain public works, consisting of buildings, roads, bases on behalf of the United States in the East and Near East and particularly in Iraq and Iran.

8. That upon information and belief said contract provided amongst other things that the defendants would comply with the Labor Laws of the Federal Government in that hours of work of laborers and mechanics on public works constructed for and/or contracts with the United States Government for such construction shall be limited to eight hours per day and that in the event laborers and mechanics are employed for more than eight hours per day, they shall receive compensation for all hours worked in excess of eight hours per day of not less than one and a half (1½) times the basic rate of pay.

9. That the Federal Statutes require that hours of work of laborers and mechanics on public works constructed for and/or contracts with the United States Government for such construction shall be limited to eight hours per day and that in the event such employees are employed for more than eight hours per day, they shall receive not less than time and a half of the basic rate of pay for all hours of work in excess of eight hours per day.

10. That pursuant to the aforesaid contract, the defendants did build public works consisting of bases, buildings, roads in Iraq and Iran on behalf of the United States Government.

11. That on or about the 16th day of February, 1942, the plaintiff was employed by the defendants on said public works in Iraq and Iran pursuant to the aforesaid contract that the defendants had with the United States Government and did continue to work there until June 10, 1943.

12. That the plaintiff was one of those persons who was entitled to be paid time and a half for more than eight hours work per day on public works.

13. Upon information and belief that the defendants were required to keep records and reports of plaintiff's working hours per week showing amongst other things the hours worked each day, the hours worked each week, the regular rate of pay and the basis upon which wages were paid to the plaintiff herein.

9 14. That upon information and belief that from April 1, 1942 until December 31, 1942, plaintiff was employed by the defendants and worked for a total of 3,430 hours.

15. That upon information and belief that the plaintiff worked for the defendants 2030 hours overtime for the period between April 1, 1942 and December 31, 1942.

16. Upon information and belief that the reasonable value of plaintiff's work during the aforesaid period of employment was in the sum of $75.00 per week.

17. That the defendants have failed to pay the plaintiff time and a half for overtime worked and that the total amount due to plaintiff from the defendants for all said overtime work of the period set forth herein is in the sum of $4750.00.

18. That no part of said sum has been paid although due payment for said overtime compensation has been made by the plaintiff to the defendants and refused by them.

WHEREFORE, the plaintiff demands judgment against the defendants in the first and second causes of action in the total amount of $5385.00, together with costs and disbursements of this action, together with interest from the 1st day of April, 1942.

CHESTER A. LESSLER,
Attorney for Plaintiff,
Office & P. O. Address,
58 West 40th Street,
Borough of Manhattan,
City of New York.

(Verified on December 16, 1943 by Chester A. Lessler)

---

10 In Supreme Court of New York

Answer to Amended Complaint.

Sir:

The defendants, by their attorney, James B. M. McNally, United States Attorney for the Southern District of New York, answering the amended complaint of the plaintiff herein:

As to the First Cause of Action on Information and Belief:

1. Deny each and every allegation contained in paragraphs of the amended complaint numbered "3" and "5".

2. Deny each and every allegation contained in paragraph "4" of the amended complaint, except admit that the plaintiff received from the defendants the sum of $60.00 per week from February 16 to September 6, 1942, inclusive, and $70.00 per week from September 7, 1942 to January 3, 1943, inclusive, and $95.00 per week from January 4, 1943 to February 5, 1943, inclusive, and $60.00 per week from March 8, 1943 to June 9, 1943, inclusive.

As to the Second Cause of Action on Information and Belief:

3. Deny each and every allegation contained in paragraphs of the amended complaint numbered "8", "12", "13", "14", "15" and "16".

4. Deny each and every allegation contained in paragraph "9" of the amended complaint, except admit that certain statutes and regulations have been enacted and promulgated with regard to the hours of work and rates of pay for certain persons employed in certain work, and as to such statutes and regulations the defendants deny that such statutes or regulations are applicable to the Project in question or to the plaintiff while so employed on such Project.

5. Deny each and every allegation contained in paragraph "11" of the amended complaint, except admit that no part of said sum of $4,750.00 of the defendants on or about the 16th day of February 1942, pursuant to a contract of employment, a copy of which is annexed hereto, made a part hereof and marked "Exhibit A".

6. Deny each and every allegation contained in paragraph "17" of the amended complaint, except admit that the defendants have paid the plaintiff in full for all of the services rendered pursuant to said agreement of employment.

7. Deny each and every allegation contained in paragraph "18" of the amended complaint, except admit that the plaintiff entered the employ has been paid, although demanded.

For a First, Separate, Complete, Affirmative and Distinct Defense to the First Cause of Action, Defendants on Information and Belief Allege:

8. That on or about the 14th day of February, 1942, the defendants entered into a written agreement of employment with the plaintiff, a copy of which is annexed hereto, made a part hereof and marked "Exhibit A".

9. That pursuant to said agreement of employment the plaintiff entered the employ of the defendants on or about the 16th day of February, 1942, and continued in their employ pursuant to said agreement of employment to on or about June 9, 1943.

10. That during all of the aforesaid period the defendants paid the plaintiff the salary provided for in said agreement of employment (Exhibit A).

11. That the defendants have performed each and every agreement on their part to be performed and that the plaintiff has been paid in full for the services rendered pursuant to said agreement of employment.

12. That plaintiff has rendered no work, labor or services to the defendants outside of or in addition to the services called for in the agreement of employment (Exhibit A).

13. That by reason of the aforesaid, the defendants are not indebted to the plaintiff in any amount.

WHEREFORE, defendants demand judgment dismissing the amended complaint of the plaintiff herein, together with the costs and disbursements of this action.

PLEASE TAKE NOTICE that you are hereby required, within ten days, to file and serve the following bill of particulars of the plaintiff's alleged cause of action herein:

1. Will plaintiff claim that he performed work, labor and services to the defendants by reason of a contract? If so, where, when and the name of the person with whom, on behalf of the defendants, the plaintiff will claim he contracted.

2. Will plaintiff claim that the contract was oral or in writing? If oral, a complete detailed substance thereof; if in writing, set forth a true copy thereof.

3. Set forth the name of the person, on behalf of the defendants, at whose special instance and request the plaintiff will claim he performed work, labor and services as head cook at the construction project, as alleged in paragraph "3" of the amended complaint.

4. Set forth a complete and detailed schedule or statement showing the nature of the work, labor and services allegedly performed and the date or dates on which said work, labor and services were allegedly performed.

5. Set forth the date on which, the place where and the person to whom on behalf of the defendants, the plaintiff will claim he

demanded payment of the sum of $635.00, as alleged in paragraph "5" of the amended complaint.

6. Set forth the address of the present residence of the plaintiff.

7. Set forth in full the particular and specific "Labor Laws of the Federal Government", as alleged in paragraph "8" of the amended complaint, which plaintiff will claim the defendants agreed to comply with in Contract No. DA-W 1098, Eng. 109, dated November 10, 1941.

8. Set forth in full, the particular and specific "Federal Statutes", as alleged in paragraph "9" of the amended complaint, which plaintiff will claim contained the requirements and provisions set forth in said paragraph.

9. Will plaintiff claim that he was employed by or performed for, the defendants, the services of a laborer? If so, when, where, and by whom, on behalf of the defendants will plaintiff claim he was so employed and performed such services.

10. Will plaintiff claim that he was employed by, or performed for, the defendants, the services of a mechanic? If so, when, where, and by whom, on behalf of the defendants will plaintiff claim he was so employed and performed such services.

11. Will plaintiff claim that he was one of those persons who was entitled to be paid time and a half for more than eight hours work per day, as alleged in paragraph "12" of the amended complaint, by reason of the "Labor Laws of the Federal Government" and/or the "Federal Statutes" as above referred to? If not, by reason of what statute, law, contract or agreement will plaintiff so claim?

12. By reason of what statute, law, contract, agreement, or other compulsion, will plaintiff claim the defendants were required to keep the records and reports of the plaintiff's hours and pay rate and basis, as alleged in paragraph "13" of the amended complaint.

13. Set forth a detailed schedule showing the basis of plaintiff's claim that he worked a total of 3430 hours between April 1, 1942 and December 31, 1942, as alleged in paragraph "14" of the amended complaint and indicate specifically the number of hours worked each day of said period, the hours between which such work was allegedly performed by the plaintiff on each day, and indicate the hours between which on said days the plaintiff will claim he worked 2030 hours overtime, as alleged in paragraph "15" of the amended complaint.

14. The name of the person in the employ of the defendants by whom plaintiff will claim he was directed to perform the 2030

hours overtime work as alleged in paragraph "15" of the amended complaint.

15. Show in detail the basis for and the computation of the amount of plaintiff's claim in the sum of $4,750.00, as alleged in paragraph "17" of the amended complaint."

Dated: New York, N. Y., January 6, 1944.

Yours, etc.,

JAMES B. M. MCNALLY,
United States Attorney for the
Southern District of New York,
Attorney for Defendants,
Office & P. O. Address,
United States Courthouse,
Foley Square,
New York, N. Y.

To:

CHESTER A. LESSLER, ESQ.,
Attorney for Plaintiff,
58 West 40th Street,
New York, N. Y.

(Verified by Lazarus White, on January 6, 1944)

---

16 In Supreme Court of New York

Bill of Particulars.

Plaintiff by his attorney, Chester A. Lessler, as and for his bill of particulars, respectfully alleges as follows:

1. The plaintiff was directed by agents of the defendants at Iran and Iraq and put in charge of the camps at Iraq and Iran to perform services as head cook.

2. Said contract was oral and was to the effect that the plaintiff was to perform services as head cook, set up kitchens, obtain assistants and employees, make arrangements for food and feed the men in the various camps.

3. Same as item 1.

4 & 5. Plaintiff performed the work of head cook on the following dates and is entitled to the sum of $735.00, as follows:

February 16, 1942 to August 7, 1942
Received $60.00 per week instead of $75.00 per week.
Total balance due $370.00
August 7, 1942 to December, 1942.
Received $70.00 per week instead of $75.00 per week.
Total balance due 103.00
March 8, 1943 to June, 1943
Reclassified to $60.00 per week instead of $75.00 per week.
Total balance due 262.00

TOTAL $735.00

17 6. Third Avenue & 183rd Street, Bronx, New York.

9. Plaintiff will claim that he was employed by the defendants through Edward N. O'Neil on February 14, 1942 in New York City; that he performed services at Raffidayah, Iraq; Ahwaz, Iran; and Karkheh River Camp, Iran, from February, 1942 to June, 1943, which includes time for transportation both ways.

10. Same as item 9.

13 & 14. Plaintiff is unable to give a detailed schedule of working hours without examination before trial of the books and records of the defendants with respect to information demanded in items 13 and 14.

Dated: New York, January 31st, 1944.

Yours, etc.,

CHESTER A. LESSLER,
Attorney for Plaintiff,
Office & P. O. Address,
58 West 40th Street,
Borough of Manhattan,
City of New York.

To:

JAMES B. M. MCNALLY, ESQ.,
Attorney for Defendants,
Office & P. O. Address,
United States Courthouse,
Foley Square,
New York, N. Y.

18 In Supreme Court of New York

Further Bill of Particulars

Plaintiff by his attorney, Chester A. Lessler, for his further bill of particulars, answers the demand as follows:

1. Plaintiff claims that he performed the alleged work of head cook by reason of direction by the person in charge of the camp at Ruflidayah, Iraq, on or about February 9, 1942; at the camp in Ahwaz, Iran, on or about April, 1942; at the camp in Korkheh River, Iran, on or about June 12, 1942. It is not possible to give the names of the persons of these camps at this time for the reason that Frank Paul Filardo cannot be reached and the aforesaid information is being given by the attorney from records and data in his possession. Additional information will be furnished immediately upon contacting the plaintiff herein.
2. The contract to perform services of head cook was oral and was to the effect that the plaintiff was to organize the cooking facilities at the various camps and engage all the necessary help and perform all services required of head cook.
3. It is not possible at this time to set forth the names of the persons at whose special instance and request the plaintiff performed said services as head cook as the plaintiff cannot be contacted and said information is unknown at the present
19 time to the attorney who is setting forth these particulars. Immediately upon contact with the plaintiff herein, the particulars desired will be furnished.

9 & 10. Plaintiff will claim that he performed the services of a laborer and mechanic.

Dated: New York, March 10, 1944.

Yours, etc.,

CHESTER A. LESSLER,
Attorney for Plaintiff,
Office & P. O. Address,
58 West 40th Street,
Borough of Manhattan,
City of New York.

To:

JAMES B. M. MCNALLY, ESQ.,
Attorney for Defendants,
Office & P. O. Address,
United States Courthouse,
Foley Square,
New York, N. Y.

20 In Supreme Court of New York

Trial Term—Part IV.

Extract from Clerk's Minutes.

January 3, 1947

I hereby Certify that this cause was tried before Hon. Edgar J. Nathan, Jr. and a jury, on the 2nd and 3rd days of January, 1947.

Plaintiff moved to amend complaint to demand $735 in the 1st cause of action and $4,850.28 in the 2nd cause of action—Motion granted.

Plaintiff moved to amend title of action by correcting name of defendant to read "Spencer, White & Prentis, Inc."—Motion granted.

Defendants' motion made at close of plaintiff's case to dismiss the 1st cause of action granted.

Each side moved for a directed verdict and the motions were denied.

A unanimous verdict was rendered for the plaintiff and against both defendants in the sum of $2,496.36. Interest from the 1st day of September, 1942, amounting to $650, added by direction of the Court, making a total verdict in favor of plaintiff in the sum of $3,146.36.

Defendant moved to set the verdict aside—Motion denied. Twenty days' stay of execution and sixty days to make a case granted.

ARCHIBALD R. WATSON
Clerk

---

21 In Supreme Court of New York

Judgment Appealed From.

The issues of the above-entitled action having been regularly brought on for trial by Mr. Justice Edgar J. Nathan with a jury, at a trial term, Part IV of this Court, held at the County Courthouse in The City, County and State of New York, on the 2nd and 3rd days of January, 1947, and the parties having appeared by counsel and the issues having been duly tried, and the jury having rendered its verdict in favor of the plaintiff, Frank Paul Filardo, in the sum of $2496.36, together with interest in the sum of $650.00 against the defendants, Foley Bros., Inc. and Spencer White & Prentis, Inc. and the motions to set aside said verdict and dismissal of the complaint having been denied by the Court

Now on motion of Chester A. Lessler, Esq., attorney for the plaintiff herein, it is

ADJUDGED that the plaintiff, Frank Paul Filardo, recover from the defendants, Foley Bros., Inc. and Spencer White & Prentis, Inc., of 10 East 40th Street, Borough of Manhattan, City and State of New York, the sum of $2496.36 with interest from September 1st, 1942 amounting to $650.00, together with the sum of $181.60 costs as taxed, making in all the sum of $3327.96 and that Frank Paul Filardo, have execution thereof with 20 days' stay.

(sgd) ARCHIBALD R. WATSON
Clerk.

Dated: January 8, 1947.

---

22 In Supreme Court of New York

New York County

Trial Term—Part IV

Index No. 15220—1943

Frank Paul Filardo, Plaintiff,

—vs—

Foley Bros., Inc. and Spencer, White & Prentis, Inc., Defendants.

Case and Exceptions.

New York, January 2-3, 1947

B e f o r e :

HON. EDGAR J. NATHAN, JR. and a jury.

A p p e a r a n c e s :

For plaintiff,

CHESTER A. LESSLER, ESQ.,
551 Fifth Avenue,
New York, N. Y.

For defendants,

JOHN F. X. McGOHEY, ESQ.,
United States Attorney,

(Harold J. Raby, Assistant United States Attorney, of counsel),
United States Court House,
Foley Square,
New York, N. Y.

The jury having been duly impaneled and sworn and the case having been opened to the jury by Mr. Lessler on behalf of the plaintiff, and Mr. Raby on behalf of the defendants, FRANK
23 PAUL FILARDO (residing at 129 West 48th Street, New York, N. Y.), the plaintiff herein called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination by Mr. Lessler:

Q. Mr. Filardo, what do you do for a living? A. I am a cook.

Q. In February 1942 did you go up to see anybody with reference to a position as a cook? A. That's right.

Q. Whom did you go to see? A. With Spencer, White & Prentis and Foley Brothers, Incorporated.

Q. And what was that job about? A. It was a job as a cook overseas.

Q. And did you talk to several people there? A. Yes, several.

Q. And as a result of your conversation, what was said at the time about the job? A. Well, I was hired as a cook. They were hiring at different rates of pay, 75 and 60, at the time. I had been working down in Miami, and in Washington, and I am up to New York, and so I wasn't known here very well, so they hired me temporarily at $60. a week and then when my work was satisfactory and my position called for it I was to get more money.

Q. And what position were you hired for? A. As a cook, as assistant cook that is, and it was so understood.

Q. And as a result of that you entered into this agreement? A. (Examining paper). Yes.

Q. Is that your signature on the paper? A. That's right.

24 Mr. Lessler: I offer it in evidence.

Mr. Raby: No objection, your Honor.

(Received in evidence and marked Plaintiff's Exhibit 1.)

Q. Now, after you signed this contract, what was the next step that happened, what happened? A. Well, I left to go overseas, to go to work, to this work in Persia.

Q. When did you leave? A. On the 16th. I signed on the 14th.

Q. And how did you go? A. By boat and plane.

Q. How long were you in travel? A. 40 days. We stopped in West Africa for five days, to wait for a plane, and it was there that I had malaria, which I didn't know at first, which I didn't know about until later.

Q. You found out about that later? A. Yes.

Q. Where did you arrive at, what destination? What was your destination? A. Basra, Iraq.

Q. When did you arrive there? A. The last day of March.

Q. What happened? A. I was put to work immediately, sir.

Q. Doing what? A. Cooking. As a cook.

Q. And for how long did you perform this duty at Basra? A. It was in Basra, at a camp called Um Qasr. I was there overnight and then I was sent to Raffidayah the next day, where I worked until I was sick with malaria.

Q. Well, how many days did you work before you were sick? A. Oh, a period of around a week or so or more.

Q. That was in April? A. That was in April.

25 Q. And when did you go to the hospital? A. Did you go to a hospital? A. Yes, for two weeks—for fourteen, fifteen days.

Q. And then what happened after you got out of the hospital? A. I was put back to work again as a cook at Um Qasr.

Q. And how long did you work there? A. About five days.

Q. So that brought you down to when, to the beginning of May? A. Yes, about that.

Q. And where did you go from there? A. To Ahwaz, in Iran.

Q. And how far away is that? A. Oh, it is not very far. Approximately a hundred miles as a crow flies, I imagine, or more.

Q. And what was doing down there in Ahwaz? What was there? A. It was a road there being built from the Persian Gulf to meet a road or route going to Russia.

Q. Well, this Ahwaz, is that a town? A. Yes, it is a town in Iran.

Q. In Iran? A. Yes.

Q. I see. And were you sent there to set up camp? A. To the main camp there. It was an unfinished hotel building, which was stopped during the war. It was a bare building. It wasn't completed.

Q. And you got there in the beginning of May, is that right? A. About the 3rd of May, I think. I can tell you definitely if you will wait. I have my notes here.

Q. All right. A. (Referring to papers). It was about May 8th.

Q. I see. And what did you start doing when you got there? A. I had to cook there.

Q. Well, what did you do? A. I prepared all the meals.

26 Q. Well, now, when you got to that camp, what did you find in the way of cooking facilities there and what did you have to do with what cooking facilities you had there? A. Well, we had a primex stove, a 2-burner gasoline stove, and a field range, which did not work most of the time, which is a gasoline stove also, one burner.

Q. Well, were you cooking in the open? A. Well, in order to prepare the meals with the poor equipment that we had there then I had to make fires outside, as well as use blow torches, as well as tiny stoves that we had there.

Q. I see. When did you get up, what time, and what did you do? A. Well, in order to get my work done and of feeding over 200 men there several meals a day, I had—at that camp I had to get up at three o'clock in the morning. I had to because I had to get up by that time in order to prepare my fires, get my fires going, and get my things organized, and my foodstuffs, in order to have breakfast ready by six o'clock in the morning—a quarter to six, six o'clock.

Q. You got up that early, you say, and got your fires prepared? A. Yes, I had to.

Q. And what was the next thing you did? A. Well, as I said, I had to cook the food, to get the breakfast ready for the men.

Q. And what was the breakfast? What did the breakfast consist of, generally? A. Well, it was generally a cooked cereal, fruit juice, eggs and bacon, something like that, and potatoes, generally.

Q. And you had to cook all that yourself? A. Yes, that's right.

Q. And you had no help, no other cooks. A. No other cooks, no, sir.

27 Q. And how about serving the meals? A. Well, we dished it out in the kitchen. We had some natives there who carried it out to the tables.

Q. Who dished it out? A. I did.

Q. How many men did you start with there? A. It was four the first day, and then it increased every day very rapidly. We got something like 40, 50 more men in there every day, and sometimes convoys stopped by there and I had to feed them too.

Q. I see. And you got finished with your breakfast about when? A. Oh, I imagine around eight o'clock or a little later. By the time we got washed up it was later. By the time we had scrubbed every table there and scrubbed the kitchen down, which had to be scrubbed down after each meal, it was, I imagine, approximately eight o'clock or a little later.

Q. And what was the next thing that you had to do? A. To prepare lunch and also to pack lunches to take out.

Q. I see. And what did that luncheon consist of? A. Well, it was a full meal.

Q. What was it? What did it consist of, generally. A. Well, soup or fruit juice, something like that, and meat, and vegetables and potatoes, and so forth and so on, and drinks.

Q. Now, you said you boxed or packed lunches in addition to that? A. Yes, I did.

Q. What kind of lunches did you put up to take out

several sandwiches and whatever we had. There wasn't great variety at the time. And fruit and cold drinks, drinks, both.

Q. How many sandwiches did you prepare for each man

Oh, approximately three.

28 Q. And how many men did you prepare such packed lunches for to go out? A. Oh, it varied from day to day. I was told the night before how many I would have to prepare for.

Q. Well, generally, about how many. A. Oh, between a dozen and fifty.

Q. And you say that they would get individual drinks in addition, is that right? A. Yes, such as we had available. Not exactly individual.

Q. And who prepared all that? A. I did.

Q. And after that was finished, you say you had to serve the luncheons? A. Yes, that's right.

Q. About what time? A. About twelve o'clock. It was in two shifts. Our meals were in two shifts. The tables did not seat all the men at one time, and so we had to serve them in two shifts.

Q. Well, when would the second shift be ready? A. About an hour later or three-quarters or an hour later, whenever the tables got cleared.

Q. I see. And you were in the kitchen all the time? A. That's right.

Q. And what happened after that? A. Then we scrubbed up again and then we prepared for dinner.

Q. Well, what time was it, generally, dinner? A. Six o'clock.

Q. What would you have for dinner? A. We had the most elaborate meal of the day, which varied.

Q. And that would consist of what, generally? A. Soup, also juice, usually, or fruit, salad, vegetables, meat, potatoes, and so forth and so on, with drinks.

Q. How many shifts for dinner? A. Two usually.

Q. And when would you finish up with dinner? A. Well, they would come in and eat rather late. Some of the time when

29 the men were out in the field they would not come in for

dinner until a couple of hours or so later, about eight, eight-thirty or nine o'clock sometimes, and we would have to serve them, of course, and then we would have to scrub down the tables and the kitchen, of course.

Q. And then what would you do, if anything? A. Then I wouldn't get finished until later, and I was tired, and then after that I was ready for the next day.

Q. Well, I mean how long would you stay there before you finally finished with your dinner and cleaned up the tables and scrubbed the kitchen down? A. Oh, I would knock off about eleven o'clock. It was a tough camp. I had to stay up that late.

Q. I see. And that was your usual routine every day? A. In this camp it was, yes.

Q. And how long did that continue? A. I was in that camp for over a month.

Q. How about Sundays? A. Well, they ate Sundays too.

Q. You mean you did the same thing on Sundays? A. Yes, that's right.

Q. Now, were you sick at any time during that month? A. Well, no. I was told, along about the end of the month, by the Army doctor there, that if I did not find some time off or of taking a day off or get some help, my health would break down, or he would take me off anyway, and to find some other way of preparing my food.

Mr. Raby: I object to that as hearsay, if your Honor please, and ask that the answer be stricken out.

30 The Court: Strike out what he was told. Granted.

Q. Well now, how many days did you work those days, in May, did you put in in May; will you tell the Judge and jury? A. 26 days.

Q. 26 days in May? A. Correct.

Q. Those 26 days in May you put in all those hours, that you testified to, is that right? A. That's right.

Q. And at the end of that month what did you do about your overtime? Did you ask anybody for overtime pay for your overtime work? A. Oh, yes, I applied for it in the form of a writing.

Q. You did? A. Yes.

Q. About when? A. Well, you have a piece of paper where I have an answer.

Q. Yes, but just answer my question. About when was that? A. At the end of the month of May or the first part of June.

Q. I see.

Mr. Tessler: I ask for the defense to produce his application for overtime pay, if you have it, pursuant to the notice to produce.

Mr. Raby: We cannot produce it because we do not have it.

Q. You put in such application, you say? A. Yes, I did.

Q. Do you remember what that consisted of? A. Yes. But that piece of paper you have, their answer, is not accurate.

Q. I know that. That is their piece of paper that they sent to you. But your piece of paper, that you put in, do you
31 remember what you put into it? A. Yes, I put in ten hours a day overtime.

Q. Ten hours a day overtime every day, is that right? A. That's right.

Q. Did you get a rejection slip of your claim later? A. Yes, sir. That is it there, that you have.

Q. Is this it? A. (Examining paper). Yes that is the one.

Q. Now, you say that the hours and dates on there, on this rejection slip, are not accurate? A. No, they are not accurate. It's impossible. I couldn't work ten hours a day overtime and two the next. That doesn't make sense. It's not accurate.

Q. Well, you did not put that in there? A. No.

Q. You put in ten hours overtime every day, you say, is that right? A. That's right.

Q. All right.

Mr. Lessler: Now may I have that paper marked for identification, please.

(Paper dated June 16, 1942, above referred to, marked Plaintiff's Exhibit 2 for Identification.)

Q. Well, what was the result of your application for overtime pay? A. It was disapproved.

Q. Then what happened after that? Where did you go after that? A. Well, after I come out of the hospital I was sent to a new camp at Karkheh River.

Q. Well, about how far was this camp from where you were? A. About 25 miles.

32 Q. And where was this camp, in a town? A. Well, really there was no camp there. It was a desert. They just built a camp there on a desert, with roads going through.

Q. I see. Now when did you get there; about when? A. On June 9th, I believe.

Q. All right. At the time you got there, what did you do? What was the first thing you did? A. The same thing.

Q. Well, just tell us, please. A. Well, at this camp the first few days it was much smaller, and the same routine, I cooked three meals a day.

Q. Well, did you have anything there to begin with? A. Nothing. We were just in tents.

Q. Did you have any cooking facilities or utilities? A. We had a gasoline stove, a 2-burner affair, a small portable.

Q. Well, were you in a house or in a tent? A. In a tent.

Q. You were set up in a tent? A. That's all. That's right.

Q. And you had to get the whole thing started up? A. That's right.

Q. There was nothing there? A. That's right.

Q. And you were there along as the cook? A. Yes.

Q. How many men did that camp have? A. Over 200 when it was built up, about 200.

Q. I see. And you were the cook? A. Yes.

Q. Now, what was your routine there? A. The same thing, three meals a day.

Q. Well, how about the meat situation? A. I had to buy beef myself, a cow, a lamb, chicken, whatever was available.

Q. What did you do about meat? A. What do you mean?

33 Q. Did you prepare it? A. I did.

Q. Well, did you kill any beef? A. Yes, I had to slaughter it, skin it, dress it, cook it.

Q. I see. So that was in addition to your other duties in this camp, is that right? A. That's right.

Q. And how long did this routine last at this camp? A. This lasted until—well, there was some variation—until the end of the year.

Q. Now how many days do you claim for the month of June overtime? A. Just a moment, I will tell you. (Referring to papers.) 29 days overtime. No, I beg your pardon; 20 days overtime.

Q. Now, do you include Sundays there? A. I include Sundays that I worked there, yes.

Q. That includes Sundays, the 20 days in June? A. Yes, that includes three Sundays in June.

Q. I see. And what happened the other days? Were you sick? A. I was sick on June 30th in that month.

Q. What happened to the other days in June? Were you sick then, too? A. Oh, I beg your pardon. That was the right figure the first time, 29 days.

Q. 29 days in June? A. Yes, sir. I just have a mistake in the copying, in copying it onto the paper. 29 days in June.

Q. All right. What happened the next month, in July? A. The same routine.

Q. All right. A. I was sick part of July.

Q. How many days do you claim for July? A. Just 19 days overtime in that month.

Q. 19 days overtime in July? A. Yes.

Q. And you were sick in that month, too, and spent time in a hospital, not working, is that right? A. Yes, I was sick several days that month, that's right.

Q. All right. Well, how about August? A. 25 days overtime.

Q. In August? A. Yes.

Q. And were you sick the balance of the time? A. I was sick from the 1st to the 4th inclusive.

Q. Now, did that include Sundays, too, the overtime? A. Yes, four Sundays in August.

Q. I see. And how about September? A. 30 days overtime.

Q. In September? A. Yes.

Q. And did that include Sundays? A. Yes, four Sundays.

Q. Now, on Sundays you worked exactly the same hours, isn't that right? A. Naturally, yes.

Q. All right. How about October? A. 26 days.

Q. And how many days were you sick in October? A. From the 27th through the 31st.

Q. 26 days overtime in October? A. Yes.

Q. All right. How about November? A. Well, that is 21 days overtime, which includes three Sundays.

Q. And in December? A. That is 20 days only.

Q. All right. Now have you figured up the total number of hours, including time and a half for Sundays? A. Yes, I have.

Q. What do the hours amount to? A. 1996 hours.

Q. And what was the rate per hour that you figured? A. I figure my rate as $2.43 per hour as overtime rate.

Q. As time and a half rate? A. As time and a half rate. My other time I can tell you in a minute.

Q. I know. The time and a half rate you figure as $2.43 an hour, is that right? A. Yes, that's right.

Q. And what does that total amount to for that whole period? A. Well, at that rate the total is $4,850.28.

Q. I see. Now when did you leave camp? Did you continue to work after the first? A. Of the year?

Q. Yes. A. Yes.

Q. But you are not making a claim for that? A. No, sir.

Q. When did you quit? A. March. I did not quit. I was sent back. The job was over.

Q. The job was over? A. Yes.

Q. Your contract was over, is that right? A. That's right.

Q. Now, did you make any claim there? A. Yes, I did, when I came back.

Q. Did you make any claim over there before you left? A. Yes, before I left I asked them about it, and they couldn't find the first slip I filed. I put in. They said I didn't file one.

Q. Who did you speak to? A. They told me that it will all be adjusted in New York.

Q. Do you remember to whom you spoke over there? A. I don't know. It was several people. It was my supervisor, and so forth and so on. There were various ones I talked to over there.

Q. And where was this claim you put in, in what office or at what port? A. In Ahwaz.

Q. Back in Ahwaz? A. Yes, the main office.

Q. That was the main office? A. Yes.

Q. And they told you to file it when you got here in New York, when you got back to New York? A. Yes, they said if there was any question about it to adjust it there, in New York.

36 Q. And did you go back to New York? A. Yes.

Q. When did you get back here in New York? A. On June the 10th, and then I went to their office here in New York about it.

Q. And did you file such claim with them then? A. Yes, immediately, I did.

Mr. Lessler: May I have the claim which he filed in New York?

Mr. Raby: I do not have the original. I just have a photostat copy.

Q. Well, is this the claim which you filed for overtime, or is that what they gave you back? A. (Examining paper.) No, this is the one. Yes, this is the one I received back. They gave me a blank to fill out, which I did.

Q. Is this the blank? A. No, sir.

Mr. Lessler: Do you have the blank which he claims he filled out?

Mr. Raby: No. We have a photostat of it.

Q. Do you recall this? Did you fill this out? A. (Examining paper.) This was filled out in Ahwaz.

Q. Oh, that is the one you made out in Ahwaz? A. Yes, just before I left.

Q. Look at this one now. A. (Examining paper.) This is the same one, Ahwaz.

Q. That is the Ahwaz one? A. Yes.

Q. Is that what you filled out? Did you write that out or is that what they gave you back? A. Oh, I beg your pardon. This
37 is a combination of the two. This was completed in New York, when I got back here, with their remarks on it too.

Q. Well, did you fill out something there yourself? A. Yes.
Q. Is that it? A. No.

Mr. Lessler: Have you got the document which he claims he filled out?
Mr. Raby: Well, show him this paper.

Q. Did you fill this out? A. (Examining paper.) This is also the one in New York.
Q. All right.

Mr. Lessler: I offer this in evidence.
Mr. Raby: No objection.

(Paper dated June 10, 1932, above referred to, received in evidence and marked Plaintiff's Exhibit 3).

Mr. Lessler (to jury): You may see it, ladies and gentlemen, if you wish, but I just want to call your attention to the "Remarks" here. "Remarks" by Project Manager: "No overtime, due to weekly contract." "Remarks" by employee: "Claim overtime, classification head cook, from 5/4/42." If you want to look at it, you may, but that is just the gist of the matter.

Q. Now, to get back. When you got back here, did you file another paper? A. Yes, sir.
Q. And is this what you got back from them in response
38 to your claim? A. Yes, sir, this is a copy of it; yes sir.
Q. All right.

Mr. Lessler. I offer it in evidence.
Mr. Raby: No objection.

(Paper entitled "Employment Record," without date, above referred to, received in evidence and marked Plaintiff's Exhibit 4.)

Mr. Lessler: Your Honor, may I read part of it to the jury?
The Court: Yes.
Mr. Lessler (to jury): This is a similar sort of document, and I will read the remarks of the employee: "Claims overtime put in," and "Disapproved." "Have filed claim for baggage lost." And there is something else. If you want to see it, you may.

By Mr. Lessler:

Q. [illegible] it was soon after that that you started this action, isn't that right? A. Yes, sir. Well, not right away. It was about three or four weeks, because they kept me waiting; they wouldn't give me a definite answer.

Q. Now with regard to this head cook or first cook, you did the same type of work all the time, isn't that right? A. Yes, sir.

Q. You did all the cooking? A. That's right.

Q. Now, were there other cooks who were doing your work out there. A. No.

Q. Were other cooks, who were doing your work, were they getting different pay there? A. Yes. Well, the lowest was
39 getting $75. a week, except for the period that I was in Iraq, for the first couple of weeks I worked there and the other cooks.

Q. When was your pay first raised? A. In August.

Q. And how much was it raised to then? A. $70. a week.

Q. And when was your next raise? A. At the end of the year, in January.

Q. In January? A. Yes.

Q. And what was it raised to then? A. $95. a week.

Q. And all the other times you were getting how much? A. 60 or 70 dollars.

Q. Now, can you figure out the difference between what you claim is due you as a base minimum pay? A. Yes, I have done that.

Q. All right. A. It was $370. for the period to August 7th, until I got my raise.

Q. How much. A. $370.

Q. To August 7th? A. Yes. And then from August 7th to the end of the year, $103. Then coming back, from March 8th until I arrived back in the United States on June 10th, I was brought back to $60. a week for some reason or other, for which I claim an additional $262.

Q. You were brought back to $60. because that was the pay at which you started, isn't that right? A. That's right.

Q. But your work was as head cook all the time you were there, with the exception of the first few days, is that right? A. Yes, for the first few days, all the new cooks who were there; even those who came in with higher money, because they were extra cooks then, because there were only two camps then.

40 The Court: Mr. Filardo, will you try to talk a little slower and a little louder, please.

The Witness: I will try to do that.

Mr. Lessler: All right. May I at this time read from the examination before trial of the defendant, your Honor?

The Court: Are you finished with this witness?

Mr. Lessler: Yes. I am finished with him.

The Court: Wait until he gets through with his cross-examination before you read from the examination before trial.

Mr. Lessler: Let him finish his cross first?

The Court: Yes.

Mr. Lessler: All right.

By Mr. Lessler:

Q. Just another question. Did you make such demand for that overtime pay? A. Yes, sir, I did. It is there.

Q. And it was refused? A. Yes.

Mr. Lessler: All right. That is all.

Cross Examination by Mr. Raby:

Q. Mr. Filardo, when you signed your agreement to work for Foley Brothers as a cook, did you read that agreement before you signed it? A. Surely.

Q. I did not get your answer. A. Yes, surely.

Q. Do you recall Article 6 which states "During the term of such employment the employees shall devote all of his time and attention and give his best efforts and skill to the performance of such services in and about such projects that the constructors may from time to time assign him"? A. That was in everyone's contract, but they got overtime at time and a half.

Q. Did all the other cooks draw overtime? A. None of them during that period. Later, yes.

Q. During what period? A. They were raised to $2.00 an hour, plus time and a half for overtime, in March of 1943.

Q. Where did you get this information? A. From the cooks who were there, after I left.

Q. You state that all the cooks were raised to $2.00 an hour and time and a half for overtime? A. All the cooks who were doing my kind of work, yes.

Q. When do you say this went into effect? A. Immediately after I left there. Of course, I don't have any first-hand information excepting the cooks told me who came back to this country, whom I knew very well.

Q. There is nothing in this agreement itself, is there, concerning overtime pay? A. Nothing at all.

Q. There are provisions in the agreement, Mr. Filardo, are there not, wherein and whereby you lose pay for absences, is that right? A. For a certain kind of absence.

Q. Yes. Is it also not true that, under this contract or agreement, when you are ill through no fault of your own, you draw pay notwithstanding your illness? A. That's right, with one exception: In this country I was never ill, but over there I was ill very often due to the country I was in.

42 Q. Were you hired in New York as a cook or as a head cook? A. As a cook, as it states in the contract.

Q. When, if ever, did you protest your classification as a cook? A. Never.

Q. Did you ever enter into any subsequent written contract with the defendants subsequent to the execution of this written contract? A. Yes.

Q. When? A. Well, when my contract was up they gave me a new one at a raise.

Q. When was this? A. At the end of the year.

Q. At the end of what year? A. 1942.

Q. Do you have a copy of that contract with you? A. No, but you have the record of the raise, though, for that period.

Q. I did not ask you about any raises, Mr. Filardo.

The Court: Just answer his questions directly, Mr. Filardo.

The Witness: All right.

Q. I asked you whether or not you entered into any subsequent written contract? A. Yes.

Q. Do you have a copy of such contract? A. No.

Q. With whom did you contract? A. With Mr. Charles S. Sells, the superintendent in charge.

Q. You mean Mr. Charles Sells, who is Commissioner of Highways? A. The same man, that's right.

Q. The same man? A. Personally, yes.

Q. He entered into a subsequent written contract with you? A. Yes.

Q. Was it the same form of contract as that? A. It was a continuance of this contract at a new wage, with a new classification of "head cook."

43 Q. Mr. Filardo, you have produced yourself this original contract? A. Yes, sir.

Q. Where is the revised contract that you say you entered into with Mr. Sells? Where is the revised contract that you say was signed by Mr. Sells? A. I did not say "revised."

Q. All right. Where is the subsequent contract that was signed? A. I don't have it.

Q. You are quite sure that such a contract was entered into? A. Yes, positive.

Q. And pursuant to this contract you were paid how much? A. Pursuant to the new one?

Q. Yes. A. 60 and 70 per week. 60 up until August 7th, and 70.

Q. Well, did you not state, Mr. Filardo, that this contract was not entered into until the latter part of 1942? A. Until the 1st of 1943? The 1st day of 1943 it went into effect.

Q. Well, is it not a fact that you were drawing $95. a week in December 1942? A. No, it did not go into effect until January. Wait a minute, I have a full record of that. I want to make sure. I want to refer to it (Referring to papers). I believe you are right. I believe you are right. I believe it was in the latter part of December. This contract was good for nine months, and this was signed in the middle of February, and so that would carry it until about the middle of December, that's right.

Q. It was in December 1942 that you were designated as a head cook, is that right? A. That's right.

Q. At how much per week? A. At $95. a week.

Q. Were you ever specifically directed, requested or compelled to perform work designated as overtime work? A. Compelled? No. Directed, I must say yes, though I don't think anyone told me when I was to work exactly. I had a job to do and I had to finish it, and I did.

44

Q. Who was your immediate superior, Mr. Filardo? A. At my camp in Kharkheh River, where I was most of the time, it was, first, Mr. Burt Simmons, and then Mr. Farthing.

Q. What was Mr. Simmons' title? A. Camp superintendent.

Q. Who was your immediate superior at Ahwaz? A. My immediate superior?

Q. Yes. A. Mr. Brady and Mr. Camocco, both, different times. There was also another man there as the camp supervisor, as the camp superintendent, but I can't remember his name.

Q. Now, Mr. Filardo, I call your attention to your complaint, in the first cause of action, in which it is alleged that "On or between the 16th day of February, 1942, and the 10th of June, 1943, the plaintiff"—and that is you, of course—"did perform work, labor and services at the special instance and request of the defendants, at Ahwaz, Iran, as head cook, on behalf of the aforesaid project, and that the reasonable value of plaintiff's services as head cook was in the sum of $75. a week." Now, in the complaint, the excerpt which I have just read, I note that you claim $75. per week from the beginning of your employment in February 1942. Now I would like to call your attention to Plaintiff's Exhibit 3, where your signature appears thereon, and I read, under "Remarks by Employee, "Claim overtime and classification as head cook from May 4, 1942." Which is correct, the complaint, or do you claim for overtime as set forth in Plaintiff's Exhibit 3? Which is correct? Are you in fact claiming from the 5th of May, 1942 for your reclassification, or are you claiming from February 16th, 1942, or

45

are you not claiming your reclassification until as of the end of the year, as you have just testified, at which time you entered into this new contract with Foley Brothers? A. I never had claimed any pay, overtime pay or at a higher rate, for the time I spent going over there; but after I was put on the job, where all the cooks we had over there got a higher pay, from May 5th on is when I claim for extra pay, because all the cooks who were doing that kind of work, my kind of work, were getting that extra money, which I was not.

Q. That would be from May 5th, 1942? A. That's right, from that time on. Only from that time on.

Q. And you believe that because the other cooks got more money you should get it too, is that correct? A. No, all cooks did not get more money. There were other cooks who were assistants, helpers, who did not know anything about cooking at all. Whereas I had all the responsibility of seeing to it that the men were fed, were properly fed, and taking care of all the cooking, and so on and so forth, and from that time on I say I should have got more money. That is what I claim. My skill and ability was worth something.

Q. I merely repeat that in your complaint, calling your attention to your complaint, wherein you claim reclassification as head cook from the 16th day of February, 1942—I call your attention to that—and I also call your attention to this claim you have put in, and I am merely trying to bring out whether you are claiming the right to be paid $75. a week from February 1942 or from May 1942? A. No, sir, I am not.

46 Q. Which is it? A. From May.

Q. Thank you very much. Now, a few minutes ago, Mr. Filardo, you computed what you claim to be the amount due you under the first cause of action. In your computations have you credited the defendants with the time you actually did not work?

Mr. Lessler: I don't think he understands it. I am frank to say that I don't get the question myself. May I ask counsel to clarify it?

A. What do you mean the time I did not work?

Q. Have you credited the defendants as a set-off, as against what they owe you, the difference, say, between $60. a week and $75. a week? As against that additional money, to which you say you are entitled, have you credited the defendants for the time which you did not work because you were sick? A. Yes. You will find out that I was sick in two ways? One of them was where I was—

Mr. Lessler: One moment. I object to that question. I don't think that is a proper question. Under the contract he is entitled to be paid.

Mr. Raby: You are not proceeding under the contract. You are proceeding under a quantum meruit.

The Court: Overruled.

A. I will answer the question. As I said before, my sickness was of two kinds. One of them was diseases I wouldn't have gotten anywhere else—

47 The Court: The question was how you computed it.

A. (continuing)—One way I did not compute it at all. One time it was found I did not get paid for it. The other sicknesses, for which I was allowed to be paid, I compute them as straight time, regular pay.

Q. So that your final figure, which you reached, of $635., as stated in the complaint, does allow credit to the defendants for the time you did not work? Is that correct or incorrect? A. That has been taken care of in my pay.

Q. Are they your figures or someone else's figures? A. They are my figures. Who else would have them?

Q. Did you keep a running record of your overtime work and the hours that you worked during the course of your employment? A. I kept notes.

Q. Rough notes? A. Yes.

Q. Are they the original rough notes? A. No.

Q. Are they correct copies of them? A. Well, they have been amended somewhat but they are correct copies of it.

Q. Now, Mr. Filardo, you stated, did you not, that you were the sole cook at Ahwaz? A. That's right.

Q. Is it not true that during part of your sojourn at Ahwaz you were unable to work? A. No, not when I was working.

Q. When did you work at Ahwaz? A. All of May, and I think there was a few days in June. I will tell you in just a moment. (Referring to papers). Yes, all of May and four days in June.

Q. And four days in June? A. Wait a minute now. I
48 have records here that I want to go back to to make sure. (Referring to papers). No. I was sick on June 30th and July 1st, 2nd, 3rd and 4th.

Q. I did not hear you. A. Oh, we are talking about May, aren't you? I am mixed up. On May 30th and 31st I was sick with sand fly fever.

Q. And who operated the galley or the mess hall during that period? A. During that period—the day I was taken to the hospital, sick, two cooks came in there from the other camp.

Q. Was that a coincidence or did they replace you? A. It was just a lucky coincidence.

Q. You were replaced then by two cooks? A. Yes. It was just a lucky coincidence. I had a fever of 103.

Q. What was the average temperature in that geographic area where you were working? A. I don't know what the average is, but it used to be 180 for weeks at a time.

Q. 180? A. About that. The record there is about 190. It is hotter than Death Valley.

Q. It must have been pretty hot, with that temperature, I imagine? A. Yes, very very hot.

Q. Now, did I understand you correctly to say that you were the sole cook at Karkheh River also? A. No, but I was for quite some time, and then I had various helpers at various times.

Q. What was the name of the cook in charge at Karkheh River when you were there? A. The cook in charge?

Q. Yes. A. Well, I was, I presume, the first cook there, and anyone else who was there was my helper.

Q. How many hours sleep did you get on the average? A. Well, in Ahwaz I didn't get enough. Later, in Karkheh River, I got six, seven, sometimes eight.

49 Q. How many hours sleep did you get in Ahwaz, on the average? A. Five. I was lucky to get five during that whole month.

Q. How about days off? Did you get one day a week off when you were at Ahwaz and at Karkheh River? A. At Ahwaz it was an impossibility, I couldn't get off. People had to eat. And at Karkheh River, you have down in your record that I had every seventh day off. I don't know why, because I worked there seven days a week. I saw the timekeeper putting it down in the record, have it down in his record, and I went up to him and I asked him why, and he said "That's my rule, I have to write you off one day a week, on account of your contract," but that was all wrong, because I worked seven days a week. I had to. The people had to eat.

Q. Isn't it true, Mr. Filardo, that at Karkheh River they staggered the hours so that the cooks would get every seventh day off? A. They tried to, but I didn't have any good helper. I had one fellow, for instance, who wanted to be a bulldozer operator, and who would be gone for hours at a time and he wouldn't show up all day until time to eat and then he would sit down to eat with the people.

Q. What was the name of this would-be bulldozer operator, do you recall? A. No. I think he came from Mount Vernon. Let me think now. No, I don't know his name.

Q. Was he a cook? A. He came there as a cook at $60 a week.

Q. And because of his incompetence and irresponsibility, it was necessary for you, you say, to do the work that he should have done? Is that correct? A. That is part of the reason, yes.

50 Q. How about recreation, Mr. Filardo? What did you get in the way of recreation? A. Well, the company did provide a truck twice a week, I believe, for the men to come into town. They would leave about eight o'clock. But I would get come into town with the truck because the truck would leave with the men while I was at work. So I got to town very, very infrequently. I took off early a few evenings and I made a few trips to town, but very infrequently.

Q. Mr. Filardo, did you do any work as a cook while you were enroute to Iraq or Iran on shipboard? A. No.

Q. Did you do any work on your return trip back? A. Only what they asked us to do, keep watch and so forth and man guns.

Q. Do you recall how long it took you to go back? A. Yes, it took me exactly three months to get back.

Q. How did you go back? A. We came around Africa, around South America, through the Straits of Magellan, through the Panama Canal, and up to New York.

Q. Three months? A. That's right.

Q. Did you at any time or in about May or June of 1942 approach Mr. Charles Sells regarding a raise of pay from $60. a week? A. Oh, yes, I approached him several times, and the last time I was successful—no, I beg your pardon—I approached Mr. Brady several times, and when I went to Mr. Sells I got my raise.

Q. Did you ask for any particular amount? A. Yes, I asked for equality with the other cooks.

Q. You asked equality with the other cooks? A. That's right.

Q. Do you know from personal knowledge, Mr. Filardo,
51 whether there was any official classification in Foley Brothers' personnel set-up as "head cook" at the time you first started to work? A. If you will let me finish through I will answer that question. There was none until new contracts came into existence, but—

Q. Please tell us when that was? A. At the end of my nine month period, in December.

Q. Thank you. And at that time, as you stated before, you were made head cook and given a raise to $95. a week? A. That's right.

Q. Now, Mr. Filardo, were you familiar with the existence of any regulations in the camp concerning the putting in of overtime claims, written overtime claims? A. There weren't any that I know of, but I did put one in.

Q. Yes, that is the one you testified to. A. Yes.

Q. But did you ever see any printed forms handed in, as a routine matter, by persons who, by their contracts or otherwise, did get overtime? A. Yes, all the men put in those claims for overtime, every night, but I wasn't allowed to. I tried to put it in several times but they wouldn't accept it.

Q. Who usually signed those overtime sheets? A. Well, their immediate superior countersigned them, I think. I think, but I am not sure of that.

Q. Now, when you were working in the kitchen, did you have any hours between meals at all, or did you work steadily from three o'clock in the morning until eleven o'clock at night, as you have testified? A. I did not work that many hours except in Ahwaz. In Karkheh River I only worked about sixteen hours a day.

Q. All right. Now, getting back to my question, did you have any opportunity for relaxation or time off between meals?
52 A. Well, you might manage to take off a little time here and a little time there, but not a regular thing.

Q. Mr. Filardo, in your claim for overtime, as stated in your complaint, have you credited the defendants with the time that you have taken off? A. As a matter of fact, I haven't put in my full overtime. I made it a flat figure of my overtime.

Q. I see. You have just made a general statement of your overtime? A. That's right.

Q. Have you kept a record of your absences from work? A. I had one. It wasn't too thorough. I checked with the one that was given to me after the examination before trial and I have corrected mine with that, even though in some cases they had me sick when I was in transit and sick at various times when I wasn't.

Q. Is there any glaring, basic and substantial error in the company's records, as you have examined them, Mr. Filardo? A. Well, they were very inaccurate. As to how glaring they were or otherwise I can't very well say as to this day or that day.

Q. Well, what I mean is this: Supposing that the employment record shows that you were absent—this happens to be a fairly prolonged report of absences—say, on December 21st, 22nd, 23rd, 24th, 25th, 26th, 28th, 29th, 30th and 31st, 1942.—A. Yes, during that time I got no pay at all; that's right.

Q. I beg your pardon? A. During that time I received no pay of any kind; that's right.

Q. Well, those dates are accurate, are they not, sir? A. Yes, sir.

Q. May I ask you to repeat what the hour was when din-
53 ner, that is, the last meal in the daytime, was served at Ahwaz? A. Well, there wasn't any specific, definite last meal because there would be two sitting, and then when convoys would come in, and there were three or four convoys who would come in here, I mean enroute, or when men out on the field would come in, they would come in at eight-thirty sometimes, and sometimes as late as nine o'clock, and sometimes occasionally, but not often, later than nine o'clock, and when they came in they had to eat, and so I had to feed them—there was no place else there to

eat—and so you can't really say that there was any definite time.

Q. Did you not receive a direction from the camp supervisor or camp superintendent relative to closing up the mess hall when people had finished eating or when the mess hall should be closed? A. No, I had opposite instructions, to feed all men who came in to eat.

Q. And who gave you those instructions? A. The camp manager.

Q. Who was he? A. The man's name, in Ahwaz, was—oh, I can't remember it now; it slips my mind now.

Q. So that the mess hall was open at all hours of the day for anyone who wanted to come in and eat? A. No, no, that is not true, it was not. We had special hours, but these men who came in late couldn't help themselves; they were working overtime, or they were out in the field somewheres and they couldn't come back earlier, and if they didn't eat at our mess hall they couldn't eat anywhere else, they had no other place to eat, and so I had to feed them when they came in late.

54 Q. Well, what time of the day did the last meal ordinarily terminate? In other words, if you served at six o'clock the last meal, when did you stop serving? A. Ordinarily the last meal would be stopped serving by eight o'clock, ordinarily.

Q. I see. And you stated that at Ahwaz you did not get through cleaning up the tables and the kitchen until about eleven o'clock? A. Well, ten, eleven, in between there. I mean, it is not exactly, but in between there. I did not work by the clock. I had work to do and I did it, and it varied, between ten and eleven, and sometimes even later, and sometimes a few minutes after ten, sometimes eleven. It is rather hard to say just exactly when, but very often at eleven o'clock, around there.

Q. What time did breakfast finish? A. The first mess for breakfast was at six o'clock, and then the office employees and officers would come in around seven o'clock or seven-thirty.

Q. Well, when would you get cleaned up after breakfast? A. Oh, eight, eight-thirty, nine o'clock, I imagine.

Q. It took you only one hour to clean up after breakfast, and three hours to clean up after dinner? A. I did not say after breakfast. We cleaned up the tables and the messhall. But after supper we had to scrub it down thoroughly, the tables and the mess hall and the kitchen, the pots, the floors, everything; we had to go over everything then.

Q. Now, at breakfast did you serve fresh eggs? A. Yes, we served fresh eggs. We did not have powdered eggs until much later.

Q. Who supplied the fresh eggs? A. We bought our eggs locally at the time.

Q. From the natives? A. That's right.

Q. Now, you said you did a little slaughtering? A. Yes, sir.

55 Q. You served meat at the time? A. That's right, every day.

Q. Did you serve fresh meat from the time that you started as a cook there until the time you got through. A. Yes. All we had in cans was frankfurters and spam.

Q. Is it not a fact, sir, that there was a medical prohibition against slaughtering and using and cooking fresh meat? A. No.

Q. That was not the case? A. No, sir.

Q. Where did you procure your fresh meat? A. Locally.

Q. By that you mean from the natives? A. That's right.

Q. Was your conduct in securing local beef from the natives requested or approved by the defendants? A. It had to be approved by them. I couldn't spend any money of my own. It was their purchases.

Q. And you acted as a purchaser for them? A. No. It was their purchase. I mean, they had to approve it.

Q. Who gave you the money to go out to buy it? A. The camp manager would always sign a slip and give me the money to buy it or reimburse me if I spent money on it myself. For a while the head office up in Ahwaz would furnish so much every week just to buy fresh supplies of beef and so forth, and then it was changed over to petty cash and it went through some officer in a sub-camp.

Q. Isn't it a fact, Mr. Filardo, that most of the food at the base was canned rationed food? A. No. All we had in food by way of cans was frankfurters and spam and the people wouldn't eat that more than once a week.

56 Q. Were you ever served K or C rations in cans? A. No, we never served them in our camp with this Army stuff.

Q. I know it is Army stuff, but did you ever serve it? A. No, no, we never had it; we never had it.

Q. Did you serve breakfast for the administrative employees of the defendants as well as the laborers? A. Yes, all of them.

Q. Did you serve meals for the native help? A. Those who worked with us. We fed them to a certain extent, and there was a different arrangement made in various camps. In our camp we gave them food, those who worked in the kitchen and dining room, that is, we fed them out of our kitchen. The rest of them, as to the rest of them, we saw to it that they had the food rationed out to them, we saw to it that they had food all right, but we did not serve them. It was a peculiar arrangement there as to that.

Q. They had no separate mess hall of their own? A. Yes. I mean, they did not eat with us. There was a peculiar thing there. They would sort of take care of themselves, but we gave them

their rations, their food, for them to cook, for the native workers. But those who worked in our kitchen and dining room we fed them out of our kitchen.

Q. Mr. Filardo, getting back to your first cause of action again, in computing the amount you say is due, have you credited the defendants with the fact that during a certain period of time they paid you $95. a week? A. No, because that it outside of this period of time.

Q. I see. A. I don't consider that.

Q. Your complaint states that you performed these services as head cook from February 16, 1942, to June 10, 1943. A. Yes.

57 Q. And that the reasonable value of your services was $75. a week, but that you were only paid $60. a week from February 16th to August 7th, 1942, and $70. a week from August 7th to December 31st, 1942, and $60. a week from March 9th, 1943 to June 10th, 1943. Is it not a fact that you were for a time paid $95. a week? A. Oh, sure.

Q. But you haven't credited us with that payment, have you? A. Well, you see, that period of time is in 1943, and that is not in here. I am only going by 1942 when you did not pay me that much money I am claiming for.

Q. How many people did you say were at the camp at Ahwaz, when it was at its height, when you were there? A. When I was there there were 225. I was told how many to prepare for, which I did, and so I know. That is what I was told.

Q. 225? A. Yes. 240 at the most.

Q. And you say for that many people, for 225 men, there was just one cook? A. That's right. I was the cook, when I was there.

Q. How about Karkheh River, how many people were there, how many men were there? A. I was told by the assistant supervisor there were over 200 sometimes, but as a rule it was much below that.

Q. I see.

Mr. Raby: That is all. No further questions.

The Court: We will now take a short recess.

(At this point a five minute recess was had.)

58 *Redirect Examination by Mr. Lessler:*

Q. Mr. Filardo, you mentioned different assistant managers and managers of camps. Who was the assistant manager of your camp at Karkheh River where you spent most of your time? A. Mr. Ehret.

Q. And is he here in court now? A. Yes, he is, right over there (pointing).

Mr. Lessler: Will you stand up, Mr. Ehret, please?

(At this point Mr. Bernard T. Ehret rose from his seat in the rear of the courtroom.)

Q. Is that the gentleman? A. Yes, sir.

The Court: All right, Mr. Ehret, you may be seated.

Q. That is Mr. Ehret, who was the assistant manager of your camp at Karkheh River? A. Yes, sir.

Q. And he was your superior at that camp? A. Yes, sir.

Q. And was he with you during your time at Karkheh River? A. That's right, he was.

Q. That would be from approximately June to the end? A. Yes, sir.

Q. Now, on the overtime, did all the other people get overtime? A. All of them.

Q. Except cooks? A. That's right.

Q. Did the clerks get overtime? A. At first they did not, but then they asked for overtime and they got it, including the office help.

59 Q. And the only ones who did not get overtime were the cooks, is that right? A. That's right.

Q. Now, at the time that you were working at the camp, you say that you have given credit for all the times that you were out sick, isn't that right? A. That's right.

Q. You don't claim any overtime for the days you were sick, do you? A. No, of course not.

Q. Is that right? A. That's right.

Q. In other words, you have omitted all those times? A. Yes, sir, I have.

Q. And your record and your claim, as you have recited it here in court, is for those days which you worked and worked overtime? A. That's right.

Q. In fact, you have taken their record as to your sicknesses, isn't that right? A. Well, yes, I have more or less gone along with them on that.

Q. Yes. Now, on the question of your pay, while you went back, isn't it a fact, if you were given the pay you were entitled to, that you would be returned to the base pay of $75 a week on your return trip? A. That's right.

Q. Isn't that right? A. That's right.

Q. Now, you also said that there was no classification of "head cook" at the time you were there, but what was the classification? A. It was a first cook and a helper cook.

Q. There was a first cook classification? A. Yes, sir.

Q. And what did they get? A. They got $75 a week.

Q. And your work, the work that you performed, was the same as those first cooks? A. Always; that's right.

60 Mr. Lessler: That is all.

Mr. Raby: No further questions, your Honor.

(Witness excused.)

BERNARD T. EHRET (residing at 914 Palmer Avenue, Mamaroneck, New York), called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Lessler:

Q. Mr. Ehret, you were also out in Iraq and Iran, were you not, during this period? A. Yes, that's right.

Q. And you were hired by whom? A. Foley Brothers and Spencer, White & Prentis.

Q. And was it on the same job that Mr. Filardo was on, the same project? A. That's right.

Q. Now, were you at Karkheh River at the time Mr. Filardo was there? A. Yes.

Q. And when would you say that was? A. Some time in June.

Q. I see. And at that camp what work did Mr. Filardo do? A. He was the cook.

Q. Now, you were the assistant manager at that camp, were you not? A. I was assistant to Mr. Simmons.

Q. And Mr. Simmons was what? A. The superintendent.

Q. And you were his assistant? A. That's right.

Q. And in your capacity did you observe Mr. Filardo in his work? A. Yes, I did.

61 Q. Did you hear him testify as to the hours he worked from June on, at Karkheh River, until December? A. Yes.

Q. Would you say that, from your recollection, that that was substantially the amount of hours he put in? A. I think that Mr. Filardo worked a lot more than he said he did.

Q. All right. Now, from your recollection, just what did he do? A. Well, he helped to make the camp a success. I mean, without his help we wouldn't have had the camp we did have.

Q. Well, now, I am referring mainly to the hours he put in and the work he performed. A. Well, I have no actual record of his hours but I do know and it always seemed to me that I was the first one up in camp, because sometimes I had as many as 1200 coolies and I had to get them started and they had to be out before

any of the Americans, and they all had to be lined up, and so forth, and when I got up to do that Frank was already working.

Q. And by "Frank" you mean Frank Filardo? A. That's right.

Q. And what time did you get up? A. Well, I got up around four-thirty.

Q. I see. And Frank was already up and working? A. Yes, he was up and he was also preparing. And we used to have two breakfasts. Well, my job, after everything was all done in the camp, after dinner was served, I still had work to do. I had a lot of work to do. I had to check on our section of the highway, I had to place on the cards all of our equipment and so forth, I mean I was out late and I was up late, and there were many times that I saw Mr. Filardo up, late, working. Well, he did all of his
62 own butchering, he did all his own work, and he never left it to native cooks to do it or anyone else.

Q. You mean that when you came back late to camp Mr. Filardo was still up and working? A. Oh, yes, he was up and working. He was always working.

Q. Now, you worked there hard, too, didn't you? A. Yes.

Q. And did you get time and a half for overtime? A. Yes, I got part of my time, I mean all the time that was put in, that I claimed, was paid.

Q. And you yourself worked ten hours a day overtime, isn't that right? A. Yes, and sometimes a lot more than that.

Q. Sometimes a lot more than that? A. Yes.

Q. And you got paid for all the time that you put in overtime at time and a half? Whatever you put in, whatever you claimed overtime, you got paid for that at time and a half rate? A. Yes, whatever I claimed I got paid for.

Q. I see. It was possible to work all that time out there, isn't that right? A. Yes. I had a man put in a time ticket once for 24-and-a-half hours.

Q. How do you make that out? A. Well, it seems impossible, but they were maintaining a temporary road, I mean they were on road patrols, most of the time. Some of them curled up on their road patrols. I know there is only 24 hours time in a day, but I turned in a time slip for 24-and-a-half hours for that man.

Q. And how much did he get paid? A. I don't know. I did not keep the records.

The Court: Just get down to this case, please, Mr. Lessler.

Mr. Lessler: Yes, sir.

63 Q. So that the men out there did work pretty hard and pretty long hours, didn't they, some of them? A. Oh, yes. That's right.

Q. And you yourself was one of them, is that right? A. Yes.

Q. Now, you say that Mr. Filardo handled the whole job practically himself of cooking and butchering, and he wouldn't trust the work to the natives? Is that right? A. That's right.

Q. And you said you had a good camp there? A. We had the best camp on the whole Gulf.

Q. I see. And did that also include the food, the meals, the service at the mess hall? A. Yes, sir. The employees used to drive eighty miles out of the way even and come over and eat at our camp. They used to bypass Ahwaz.

Q. All right. How many meals a day do you think was served there? A. Well, we used to have a light breakfast—when we were working long hours we used to have a light breakfast, and then we would work a couple of hours and then we would come in and have a regular breakfast;—

Q. What time was the light breakfast? A. Well, probably five o'clock or five-thirty—I don't remember exactly.

Q. And when would you come back for your regular breakfast? A. And then probably eight o'clock we would have our regular breakfast. And then we would have dinner. And we used to have Mr. Filardo make up lunches for the men out on the road. I mean, Mr. Filardo used to send out to the men on the road—in fact, he started it—lunches, boxed lunches. And it was a nice thing to get a cold drink over there, in the hot climate there, where we couldn't get any ice. Mr. Filardo used to send out at ten o'clock
64 in the morning either a cold chocolate drink or some sort of cold fruit drink, out to the men on the highway, on the roadway, in a truck. He used to do that twice a day, plus the regular meals.

Q. And how many sandwiches did he put up for the men out on the road? A. He didn't put up sandwiches. He gave each one of the men an individual lunch in boxes. Well, I don't know just how many sandwiches.

Q. And then they would have a regular meal back at camp that he would have to serve? A. That's right.

Q. How about in the afternoon or in the evening? A. Well, in the evening that is when we would have our main meal. I mean, we would have roast duck, or gazelle, or wild boar, and if we wanted to have a steak Frank would butcher a cow.

Q. Well, how many shifts were there in the evening? A. To eat?

Q. Yes. A. Well, generally we could, in Kharkeh River, unless we had extras or if shifts were shifted, I mean we could get them all in on one sitting. I mean, we had a pretty big dining room there, and we could generally get them all in on one shift for eating, unless we had a convoy come through and then there would have to be a second sitting.

Q. I see. And how often would those convoys come through there? A. Quite often.

Q. Convoys would come through there quite often? A. Yes, quite often.

Q. And Mr. Filardo, you say, would do his butchering in the evening? A. Yes, most of the time.

65 Q. After he was through with the work of serving the men? A. That's right.

Q. I see.

Mr. Lessler: That is all.

Cross Examination by Mr. Raby:

Q. Mr. Ehret, will you describe in detail your exact duties when you were assistant supervisor at the camp where the plaintiff worked? A. Well, my duties were to see that everything in the camp was run properly, to check on all supplies, to check on all native help in the camp, and to receive or pass out any things coming or leaving the camp, equipment and food stuffs and all incidentals.

Q. Well, were you a sort of master-at-arms then of the camp? A. Yes, you might say that.

Q. Now, this camp was the Kharkeh River Camp, was it? A. Karkheh River, yes.

Q. Were you at Ahwaz when the plaintiff was at Ahwaz? A. Yes. I wasn't at Ahwaz very long, but I was there when Mr. Filardo was talking about. We all used to come through there. That was the headquarters.

Q. What was your official position there, Mr. Ehret, at Ahwaz? A. At Ahwaz? I did not have any official position at Ahwaz. I mean, we were all being pushed in there from Raffidayah, getting ready to start the road.

Q. Well, you were hired as what? A. I was hired as an operator in New York, and then my classification was changed.

Q. You were an operator of heavy equipment, weren't you? A. That's right, yes.

66 Q. Now, at the Karkheh River Camp, is it not a fact that your chief duty pertained to the supervision of native personnel? A. No, no, it is not, because I was in charge of all the housing, and they were by Americans, and—

Q. Well, did you supervise the messing, the eating, of the native personnel? I mean, did you supervise and keep order of the natives' mess hall and so forth? A. Well, I did not supervise that because Mr. Filardo done that.

Q. Well, weren't there two separate mess halls, one for the natives and one for the United States employees? A. Yes. We

later built a place out in the back where they ate but most of it was cooked right in our kitchen. They would cook the food in our kitchen, and then the natives ate it in the back. But what we call the waiters and the native cooks who worked in the kitchen and in the dining room, in our kitchen and dining room, they ate in the kitchen when we were through eating.

Q. Didn't you, in fact, Mr. Ehret, spend most of your day taking care of the native personnel, seeing to it that they did their jobs? A. Yes, I did.

Q. You stated in your direct examination that Mr. Filardo was always working,—do you recall that? A. Yes, I do.

Q. I take it you would say he was a pretty conscientious sort of person? A. Yes, he was, very.

Q. Now, you stated that he used to send out,—I suppose it would be cold drinks—cold drinks to the men who were engaged in manual labor on the project during the day? A. That's right.

Q. Was he, to your knowledge, ever requested or ordered to do that? Did he have to do it? A. Yes, Mr. Simmons, the
67 superintendent, authorized that.

Q. He authorized it? A. Yes, he did.

Q. And Mr. Simmons was your immediate superior, was he? A. Yes, he was.

Q. Did you, Mr. Ehret, have any authority from the defendants to direct the working of overtime hours on the part of anybody? A. Well, if you call the superintendent one who gave me authority, I did. I mean, if we had something to get done. I mean, we had a job to do and we did it.

Q. Well, then, assuming you got authority from the superintendent direct, say, John Jones, to go out and do overtime work, it was with the understanding that you could put in an overtime chit when it was done, is that right? A. Would you ask me that question again?

The Court: The stenographer will read it to you.

(Last question read by the stenographer.)

A. No, not exactly. The job was being pushed there, and for every hour or minute of overtime you did not go to the superintendent. You had foremen, and if they deemed it necessary to work overtime they did not have to run to the superintendent each time to get authorization to work these overtime hours.

Q. I see. When you worked overtime yourself, Mr. Ehret, did you get that overtime approved by anyone in writing? A. Yes. The timekeeper would take my time down, and then it would
68 go to headquarters, and it would come back and I would be paid the money.

Q. Did you yourself have any authority relative to the employment or the salaries of the American personnel at the base? A. No, I did not. I mean, I did not have anything to do with that.

Q. Mr. Ehret, were your relations with Foley Brothers, Spencer, White & Prentis, as far as you were concerned, satisfactory or otherwise? A. Very much so, a very good company.

Q. They treated you all right? A. Yes, they treated me all right.

Q. Did you get all the overtime to which you were entitled? A. I got all the overtime that I put in a claim for, yes.

Q. One more question, Mr. Ehret. Do you know whether or not it was the custom or the practice, at the base, for the various cooks to receive tips from the workers at the base? A. Well, there was no custom. It was just their good will and the feeling that the men had, because of the different conditions, on how much a cook put into serve them something a little different. And at the camps the fellows, on pay day, would generally have a collection at the door and take up a collection for the cooks, but sometimes it wasn't very much.

Mr. Raby: Will you mark this for identification, please.

(Paper entitled "Employee's Claim for Work Out of Classification," dated 11/21/42, of Bernard T. Ehret, marked Defendants' Exhibit A for identification.)

69 By Mr. Raby:

Q. Mr. Ehret, I show you Defendants' Exhibit A for identification and ask you whether or not this is your signature on it? A. (Examining paper.) That is right.

Q. Is the matter above it in your handwriting, sir? A. Yes.

Mr. Raby: I now offer it in evidence.

Mr. Lessler: No objection.

(Defendants' Exhibit A for Identification, paper entitled "Employee's Claim for Work Out of Classification," dated 11/21/42, of Bernard T. Ehret, now received in evidence as Defendants' Exhibit A.)

Q. I call your attention to Defendants' Exhibit A, Mr. Ehret. It states, in your handwriting, "I have been working in the capacity as a labor foreman since June 22nd when Burt Simmons, the camp manager, assigned this duty to me. My work has consisted of allocating the native labor to the various jobs assigned to me. Mr. Carthing also informs me that he has asked for this change in

reclassification." That is a statement by you, is it not, sir? A. That is right, yes, but long before that went into effect, long before I was reclassified, when the camp first started (handing paper to Mr. Raby). That did not go into effect until later. When the camp first started it consisted of six men with two tents.

Q. Mr. Ehret, I am not questioning your record. I think we can stipulate that your record with Foley Brothers is a splendid one. I merely call this to the jury's attention to show by your own statement that your work consisted, at least among other things, of allocating the native laborers to the various jobs they were assigned to. There was some question in your testimony as to that and I wanted to get it clearly before the jury. A. That is right.

Q. All right, sir.

Mr. Raby: I have no further questions.

Redirect Examination by Mr. Lessler:

Q. You testified that when you got your overtime pay, on the question as to whether or not there was any authorization, I think you said at that time that the timekeeper would take your time down—do you remember that? A. That's right.

Q. Well, when you went out to do the overtime, when you went out on your own as a job to do for the defendants that is, isn't that right? A. Yes.

Q. And you did not have to run to the superintendent to ask him, "May I go out and work overtime," did you. A. No.

Q. You had a job to do and you went out and you did your job? A. That's right.

Q. And when you finished your job, when you finished your work, you then put in your time? A. That's right.

Q. Isn't that the way it went? A. Yes.

Q. All right. The main thing was to get the job done? A. That's right.

Q. And whatever time was required to get the job done, it was put in? A. That's right.

Mr. Lessler: I want to read this statement to the jury, with your Honor's permission, which was not read. This statement is in evidence.

"Superior's Statement. I have written a recommendation asking a reclassification of Bernard T. Ehret from D. Op. to Labor Foreman. This man has performed the duties of Labor Foreman, which capacity he was working when I was assigned

of the Karkheh River Camp. His work has always been satisfactory and he is very dependable."

You may look at this statement, if you care to, ladies and gentlemen.

Now may I also offer in evidence, your Honor, this letter from Burt Simmons, Superintendent, as to his duties, to show that he had general supervisory duties, assistant to Mr. Simmons, who was the superintendent, and he says so in this letter.

Mr. Raby: I have no objection whatsoever.

(Letter of Burt Simmons, dated November 10, 1942, above referred to, received in evidence and marked Plaintiff's Exhibit 5.)

Mr. Lessler: May I read a portion of that to the jury?

The Court: Yes.

(Portion of Plaintiff's Exhibit 5 read to the jury by Mr. Lessler.)

72 *By Mr. Lessler:*

Q. Do you know Mr. Harris, sitting there in the back? A. Yes, I do.

Mr. Lessler: Mr. Harris, will you stand up, please?

(At this point Mr. James C. Harris rose from his seat in the rear of the courtroom.)

Q. Is that Mr. Harris, sir? A. Yes, it is.

Mr. Lessler: All right, Mr. Harris, thank you.

Q. Was Mr. Harris at Karkheh River Camp? A. No. Mr. Harris was at headquarters.

Q. I see. And how far away was that? A. About forty miles away, I think it was.

Q. Forty miles away? A. Yes, about.

Q. And that is where Mr. Harris was stationed? A. That's right.

Q. And would he get to Karkheh River? A. Well yes. Fellows used to come out there when they wanted a good meal.

Q. I see. What was his position, if you know? A. Mr. Harris?

Q. Yes. A. Well, I really don't know. I know he had a—

The Court: If you don't know, you can't tell us.

A. (Continuing)—No, I don't know what his officials position was.

73 Q. I see. But he was forty miles away from camp, from the Karkheh River Camp, is that right? A. Yes, that's right.

Q. And he was not assigned to any duties, that you know of, at that camp, at Karkheh River Camp? A. No. He may have been indirectly over us but I just don't know exactly what his position was.

Q. Well, was he on the spot at the camp at Karkheh River? A. No.

Q. Okay.

Mr. Lessler: That is all.

Recross Examination by Mr. Raby:

Q. One more question, Mr. Ehret. What was the average length of your working day? A. Well, I worked from four-thirty, five o'clock in the morning right up through sometimes ten o'clock at night, eleven o'clock, sometimes twelve o'clock, and if we had a raid I would work all night.

Q. But what did it average up as, approximately? A. Well, I never averaged it up; I don't know.

Q. I see.

Mr. Raby: No further questions.

Mr. Lessler: That is all.

(witness excused)

74 Mr. Lessler: May I at this time move to amend the complaint, your Honor, by—

The Court: Just a moment. Do we need the jury any more today?

Mr. Lessler: No, I don't suppose so.

The Court: All right, we will excuse the jury now until tomorrow morning at ten o'clock. Again, members of the jury, I ask you not to discuss this case among yourselves nor with others.

The Clerk: By direction of the Court, the jury is excused until tomorrow at ten o'clock. You will return directly to this Room. You do not report upstairs. Come here to Room 232, Trial Term, Part IV, Mr. Justice Nathan presiding.

(At this point the jury retired from the courtroom.)

Motion to Amend Complaint.

Mr. Lessler: I move to amend the complaint to read, on the second cause of action, we are suing for 1936 hours overtime, for a total sum of $4,850.28.

And also, on the first cause of action, I move to amend that first cause of action, your Honor, and ask that the sum demanded therein be changed to $735. There was an error in addition. My bill of particulars has that sum, your Honor.

The Court: Any objection?

Mr. Raby: No objection.

The Court: Granted. Have you any further witnesses?

Mr. Lessler: I have no more witnesses, your Honor, but I want to read into the record a question or two from an examination before trial of the defendants.

75 And I also move to amend the title, with respect to the spelling of the name "Prentiss", to read "Prentis," to delete the last "s."

Mr. Raby: No objection.

The Court: Granted.

(Colloquy off the record.)

(Adjournment to Friday, January 3, 1947, at ten o'clock a.m.)

New York, January 3, 1947.
10:00 a. m.

TRIAL RESUMED.

Mr. Lessler: May I offer in evidence, your Honor, a stipulation between the plaintiff and the defendants.

Mr. Raby: No objection.

(Stipulation dated November 18, 1946, received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Lessler: May I read it to the jury, your Honor?

The Court: Yes.

Mr. Lessler (to jury): This is a stipulation entered into between the plaintiff and the defendants, signed by the attorney for the defendants and myself. (Exhibit 6 read to the jury.)

76 *Motion to Dismiss.*

Now, if your Honor please, I would like to read into the record the statutes covering the case so that we have them. There are three sections. I want to read Section 324 of the U. S. Code and Section 325-A and Section 326.

The Court: Do you think it is necessary to read them into the record?

Mr. Lessler: I would like to have them read into the record, and before the jury, your Honor. I know that with other State laws you may not read them into the record, that your Honor could take judicial notice, but I think, as a safeguard to our interests, we ought to read them into the record.

"Title 40, Section 324," of the U. S. Code. "Public contracts to provide for eight-hour day; stipulation for penalty; inspectors to report violations; deduction or penalty; appeals, right of action in Court of Claims.

"Every contract made to which the United States, any territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work con-
77 templated, shall be required or permitted to work more than eight hours in any one calendar day upon such work."

Well, I don't know about the rest. Do you want me to read the rest of it?

Mr. Raby: Well, it is up to you.

Mr. Lessler: Well, I will read just up to that point. That is all that I am interested in in that section.

Now, "Section 325-A. Same; computation of wages on basic day rate of eight hours; work in excess of day rate.

"Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay."

Now, "Section 326. Suspension of eight-hour law in case of emergency; overtime pay.

"In case of national emergency the President is authorized to suspend provisions of law prohibiting more than eight hours labor in any one day of persons engaged upon work covered by contracts with the United States: Provided, That the wages of persons employed upon such contracts shall be computed
78 on a basic day rate of eight hours work, with overtime rates to be paid for at not less than time and one-half for all hours work in excess of eight hours."

Now I would like to read from an examination before trial, your Honor, just one question and answer.

Examination before trial of Eugent Kortjohn. Examination taken on February 5th, 1945, and duly sworn to on the 19th day of March, 1945. Question on page 6.

"Q. What was the minimum rate of pay the head cook got? A. We had no minimum rates of pay. My recollection is that most of them got from $75. to $95."

I think that completes my case, your Honor.

The Court: The plaintiff rests?

Mr. Lessler: The plaintiff rests.

Mr. Raby: If your Honor please, at this time—

The Court: One moment. Do you want to argue your motion?

Mr. Raby: Yes.

The Court: All right. I think I will excuse the jury.

(At this point the jury retired from the courtroom.)

Motion to Dismiss Complaint

Mr. Raby: If your Honor please, at this point I respectfully move that the complaint in this action be dismissed on the ground that there is failure to prove a prima facie case, and on the further ground, with respect to the second cause of action, that there is no cause of action stated and no prima facie case made out.

I will first consider the question of the first cause of action, if your Honor please. By plaintiff's own admission, he signed a contract at $60. a week. He has admitted that he was paid, pursuant to that contract, at a minimum of $60. a week. He has failed to show that there was any breach of that contract. Yet he testified that from May the 4th, 1942 on he rates $75. a week as a so-called head cook or first cook because of the quality of his work.

As a matter of law, I contend that that contention is no good. It is no good even if he could show that other cooks doing his work got $75. a week. You cannot sign a contract and then proceed to deny it because one of your fellow-workers

gets a little better deal. But he hasn't shown that the other cooks got more than he did. He couldn't possibly. He certainly can't show that $75. was the normal rate of pay for a head cook when he at one time drew $95. as a head cook.

Also, the evidence is that there was considerable variance—the plaintiff's own evidence shows that there was considerable variance—in the pay for head cooks. That is a matter that is obviously determined by the length of service and by the satisfactory or unsatisfactory nature of the services. He has not produced any other cooks from the base or any expert witness or cook to testify as to the general reasonable value
80 of the services of a person of that nature, nor has he produced any specific evidence, by a cook at the base, as to what that cook got.

Therefore, even assuming that there was no contract in this case, he has failed to prove a prima facie case in quantum meruit; therefore, he has no possible basis for a quasi contractual recovery.

I submit that the existence of this contract is an uncontrovertible defense to the first cause of action.

I would like to say one word about the plaintiff's testimony about a superseding contract in the latter part of 1942 as a head cook at $95. If such a contract were entered into—and of course the defendant has not conceded it and does not concede it—such contract would not correct the defense to the first cause of action because, first, this action relates back to May the 4th, 1942, and at the base of $75. a week as the alleged reasonable value of the services, and no reference is made to any contract; secondly, there is nothing in the pleadings concerning such a superseding contract and, therefore, the evidence is outside the scope of the pleadings.

Now, with respect to the second cause of action, I would first like to point out to your Honor what I feel is a fundamental inconsistency of the position of the plaintiff. He is claiming overtime pay on a statute that effects only mechanics and laborers.

81 In order to decide if a cause of action is stated, it is of course necessary for your Honor to decide whether or not a cook, generally speaking, is a laborer. Perhaps he is; perhaps he is not. I ask your Honor to pass on that question since there are no such cases on it and I, for one, am anxious for a determination on it because it will resolve similar cases and prevent other litigation. But if your Honor decides that a cook is, generally speaking, a laborer, the next question is whether this particular plaintiff is to be deemed a laborer by virtue of the fact that he is a cook.

On the basis of his testimony, he was a second Charles of the Waldorf, he was a chef extraordinary, he not only cooked but he went out and slaughtered beef, he acted as a purchasing agent, he procured the best that was available in food, he ran the camp to the satisfaction of all concerned and acquired a reputation which was spoken of in glowing terms by his witness Mr. Ehret. He has testified, in effect, that he was actually a commissary steward.

He also testified that his services, including overtime, for a period of 30 weeks, are worth the sum of $75. a week. For 30 weeks, that it a total, as I multiply it, of $2,250., plus $4,850. overtime. Adding those two figures you get $7,100. for 30 weeks' work. Dividing that by 30 you get $236.60 a week, or $12,303.20 a year. Why, that is more than a Congressman gets; it is more than a Federal judge gets—a Federal District Court Judge gets; and it is utterly fantastic; and I
82 respectfully submit that that claim should not be sustained as a matter of law when it is brought pursuant to certain statutes designed to protect the lower income bracket employees—laborers and mechanics.

More fundamentally, those statutes confer no cause of action by their express terms nor can one be inferred. The Eight-Hour Law—unlike the Fair Labor Standards Act—was not designed to raise the pay standards in cases with respect to interstate commerce, but was a public health measure designed to reduce working hours on the part of laborers and mechanics, for perfectly obvious reasons—of health.

Then the war came along. The war, of course, made the practice of this law not only untenable but suicidal. If we had attempted to comply with the Eight-Hour Law we would have found ourselves in the same position as France in 1940. As a result, the 1940 amendment was passed. This amendment, as I pointed out in my memorandum, which was submitted, suspended the operation of the Eight-Hour Law and provided that time and a half was to be paid for overtime work.

If time and a half was not paid, what then? Then the statute was applicable and the violators would be subject to a penalty as set forth in the statute. There is nothing, however, analogous to the provision of the Fair Labor Standards Act conferring an express cause of action on the part of this employee for overtime wages, or time and a half for overtime
83 rate. The statute is in derogation of the common law and should be strictly construed. It should be noted that if Congress wanted to create a right of action it could easily have done so, and did in the Fair Labor Standards Act.

Now, before this 1940 amendment, it seems to me that the non-liability of the defendants would be clear, on the basis of the Supreme Court decisions which I have cited in my memorandum, particularly the case of United States versus Martin. That case held that the mere existence of the Eight-Hour Law, making the Federal Government an eight-hour day employer, was a direction to the Government, but did not confer any cause of action upon an employee of the government for overtime wages.

Plaintiff's attorney argues that the case of United States versus Post, when read in connection with the 1940 amendment to the Eight-Hour Law, makes the Martin case inapplicable because, says plaintiff's attorney, the Post case involved the application of a postal statute which provided a specific standard, which was not time and a half for overtime but straight time for all times. In other words, if a postal worker worked eight hours for $8., then if he worked ten hours he would get $10. The Court, in the Post case, held that this statute, which specifically said that the postoffice worker shall be paid on that basis, created a right of action. Whether or not that case
84 is correct law, it is not applicable to the present case because the 1940 amendment creates no new law at all. It merely suspends the operation of the basic and main part of the law providing that time and a half for overtime is paid. If it is not paid then the basic statute becomes the law of the case.

Now, there is a further aspect in this case. This contract between Filardo and Foley Brothers and Spencer, White & Prentis has no provision for overtime. Therefore, no overtime should be allowed unless the statute requires it or unless it can somehow be worked into the contract or under the Lawrence versus Fox theory.

The plaintiff has submitted a stipulation stating that the defendants concede or the defendants agree that the United States, incident to the performance of this cost-plus contract with the contractors, would abide by all applicable laws of the United States—a general catch-all phrase. There was no specific reference to the eight-hour law, none whatsoever. It was merely an agreement to abide by all applicable laws.

Well, we still have the question of whether the Eight-Hour law is applicable to this case as far as creating a cause of action in the plaintiff is concerned. If the eight-hour law does so create a cause of action, you don't need anything in the contract, the prime contract, to fortify it; it exists without the contract, and the provision of the contract adds nothing new. It is the same as an agreement to abide by a law in general
85 which the defendants would in any case be obligated to do.

Therefore, there is a failure of consideration. Furthermore, there is no privity of contract as between the United States Government and the plaintiff. The Lawrence versus Fox theory has been limited in recent, or comparatively recent, cases. I am sure your Honor is familiar with the case of Moch versus Rennselaer wherein the Court of Appeals pointed out the dangers of unduly extending the doctrine of the Lawrence versus Fox theory. And I might add that the contract certainly could not have been made for the benefit of the plaintiff at the time it was executed because the United States had no way of knowing that this particular plaintiff was going to be employed by Foley Brothers and Spencer, White & Prentis.

Now I would like to point out one more thing, and that is: when you read the entire eight-hour law, including one section which has not perhaps been called to your Honor's attention, namely, Section 325 of Title 40, it becomes apparent that Congress, when it enacted this legislation, foresaw situations where it would be improper and unjust to impose the penalty and provided a means for reviewing the penalty with a view of remedying the same or mitigating it. To confer upon the plaintiff an unqualified right of action in this case would be to defeat the purpose of Congress in this legislation. I will just read the excerpt I have in mind—it is in Section 325:

86 "No penalties shall be imposed for any violation of such provision in such contract due to any extraordinary events or conditions of manufacture or to any emergency caused by fire, famine or flood, or danger to life or to property, or by other extraordinary event or condition, and on account of which the President shall subsequently declare the violation to have been excusable."

I therefore move, your Honor, that the second cause of action be dismissed and that the first cause of action be dismissed, and that the complaint be dismissed, for the reasons set forth in my argument.

Mr. Lessler: If your Honor please, with respect to the first cause of action, the action is in quasi contract and is predicated on the theory that he did work over and above what he was hired for. He has proven his classification as cook was a sort of second cook relationship, and that he actually worked as first cook or head cook, and on that basis he actually entered into a new and different contract when he got there, other than what he was first hired or asked to do; and there has been testimony here that there was the classification of head or first cook; that at one time it was called "first cook" and subsequently "head cook," and that the minimum rate of pay was $75 a week, and that he received less, for periods of time, and giving credit

for the times he received more, that is, that he is not asking anything for those periods.

87 Now, under that, the authorities are well established that where you do not work for what you are hired for, that that contract is by mutual agreement, changed; that is, they asked him to do something different, and he did something different, and so they can't hold him to that rate of $60. That is the reason of a quasi contract, because there is no specific contract, and he is entitled to recover the reasonable value of his services at all times. And I think that is certainly an issue to go to the jury, whether or not he did perform work different than that he was hired for, and, if so, what was the reasonable value of his services. And there is ample testimony in the record—from his testimony, and even from the last excerpt I read from the examination before trial of the defendant, who admitted that the customary rates for head cooks was $75, minimum to $95. So I think that on our first cause of action there certainly is ample authority, I mean ample reason, to submit it to the jury as a question of fact as to whether or not he worked as first cook, and that he was not a cook as he was hired for or did not do that work.

Now with respect to the second cause of action, your Honor, the first part of my opponent's argument seemed to be divided to a sympathetic pleading—and I don't know for whose sympathy he was pleading for—but on that basis, your Honor, I don't think there is any question but that this plaintiff worked ten hours a day over and above the eight-hour re-
88 quirement; and if there is any sympathy he is to get it because he did the work, and he was not paid for it, while every other man on the job was paid for it.

Mr. Ehret testified that he did those long hours of work, and even more, and Mr. Ehret got paid, and Mr. Ehret's rate of pay was higher than the plaintiff. I understand that Mr. Ehret got between $250 and $300 a week. They all got a lot of money over there. That is why they went out there, to make money. They took the risks and they did suffer and get fever and go through all those things they have to go through.

Furthermore, Mr. Raby's computations are incorrect—I mean they are just quick computations, your Honor. He did not get so much money. He got a basic of $60 a week. And if gets this overtime rate for his work there for over a year, from March until June, if he gets this overtime money, he gets probably $160 a week for the entire period of time, as an average. I don't know how he figured that out. But, anyway, so far as that is concerned, your Honor, the man worked; he is entitled to be paid, the law says so, and there is no reason

for saying, and there is no question here, that he would be getting the same as judges or congressmen, or anything like that. Congressmen have other means of making a living, and they are not confined to that work.

89 Now, with respect to the law, your Honor, my action is predicated on the eight-hour law, known as the Eight-Hour Law, which is known as Title 40, Section 324 and Section 325-A. Now that law is in two parts. The first part is that every contract made with the United States, or made by somebody with the United States, which employs laborers or mechanics, that those men cannot work more than eight hours a day. That law goes back to 1868. Now the first determination, of course, is as to whether he is a laborer or a mechanic. Now who is a laborer or a mechanic? In my brief, your Honor, I have cited two cases on that point. Bouviers Law Dictionary defines a laborer as "One who performs with his own hands the contract he made with his employer." Mr. Filardo's testimony clearly shows that he worked physically, with his hands, day and night. And the attempt on the part of my adversary to characterize him as a commissary steward is certainly not one taken from the record; it is a figment of my opponent's imagination; he would like to have the plaintiff in any other class than as a cook. But Filardo was a cook, and he worked physically, with his hands, and he did a good job, and apparently he did the work of more than one man.

Furthermore, we have the opinion of the Attorney General, Frank Murphy, who said, in 1939, when asked for an opinion, under the Eight-Hour Law, who was a laborer and a mechanic —and he indicated a policy to be followed—said: "It is
90 under all the circumstances a well warranted assumption that the Congress has intended the 'Eight Hour Law' to have a broad application and to be literally construed with this end in view."

Now, I say that Filardo is a laborer even if you give a narrow application, and certainly, if given a broad application; he is a laborer. There is no other classification you could put him in. He worked physically with his hands. He certainly was not an office worker, and he is not a mechanic, so he must be a laborer. Furthermore, as my opponent has said, the Labor Department and the Treasury Department have indicated that their present opinion is, and has been for some time, that a cook is a laborer. I so state this to your Honor. I have received such communication, informally, of course, but they have assured me that a cook, in his position, is a laborer.

Now with respect to the question of the right to sue. I have predicated, in my brief, two different rights to sue. One,

purely under the statute, and, two, under the contract, which involves the consideration of the doctrine of Lawrence against Fox.

Let me take up now purely the stautory right, your Honor. It tracing the history of the decisions under the Eight-Hour Law, we have the statute of 1868, which was a bare statement, under Section 324, which said that eight hours is a day's
91 work on public contracts. And under that we have the case of United States against Martin, which held that that was merely a directive and not anything that anybody could sue under. So far so good. But then we have the case of United States against Post, which was a suit under a similar statute, involving the Post Office Department, where this employee sued for overtime; and there we have a statute which is similar to the statute of 1940, that he was to get the same rate that he got when he worked plus overtime. It says here "to receive" it. Those are the words they used.

Under that statute the same Supreme Court of the United States differentiated the two cases and said, in the first case, "We don't know what to pay"—in the case of United States against Martin—"There is no right; so therefore it would be too broad to indicate what it might be," but in the second case we have a definite rate and, therefore, the Martin case does not apply.

And all the cases cited by my opponent I think I have discussed in my brief and showed that, even in those cases, they have specifically differentiated the Post case from the Martin case and have indicated that if there was a rate of pay for laborers and mechanics that their decision would be different. And that is the only thing that was lacking, and they have so stated it. And I have quoted innumerable portions from the
92 cases—the case of Coleman—well, practically every case which he cited. And in fact one of the cases goes on to say that they are not even sure, even under the case of United States against Martin, as to whether an employee could not sue to recover for overtime, for it said: "Even if the construction of the statutes herein indicated is too broad and the petitioner is entitled to its benefit he would have no right of action now, since the government or its agents should have had notice by protest or objection that the petitioner who agreed to labor at the salary of $40.00 a month, claimed that the agreement required that he should only work eight hours a day of each day of the month."

Now in this case we have such notice. He protested practically immediately, and he continued his protests.

And there are other cases, if your Honor reads it through, which play some importance on that protest. I think that the Court of Claims case, cited by my opponent, if your Honor will read that, also makes a distinction because of lack of protest. But here we have that protest in this case. We have that protest in this case.

So, the history of the eight-hour law, when taken in conjunction with the amendment of 1940, which specifies that time and a half rate shall be paid, clearly shows the intention of the courts to enforce such statute when there is a definite rate of pay, and we have that definite rate of pay in 1940, and,
93 therefore, it is on all fours with all constituted authorities in this country with regard to the interpretation of the eight-hour law.

Now with respect to the Lawrence against Fox doctrine, your Honor, that doctrine is also even more applicable in this case than in many of the others cited because we have here a contract. Now that contract specifies that they will agree to abide by the laws and regulations of the Federal Government. But my opponent has said that that is too broad and that it certainly does not mean to cover this particular man. Well, if it is too broad, as my opponent argues, I wonder how he would argue it on the other side of the fence if the Government would say that "you entered into a contract with a provision which made you abide by the eight-hour law"? Now the first quotation of Section 324 says specifically that every contract shall contain that provision. I would like to see them argue the point when the Government says you have no such provision. But there is such provision. So definitely that statement in the contract was meant to include the eight-hour law in there as one of the things that they agreed to abide by, because it is so stated in the eight-hour law that every contract must have that provision in it.

Therefore, having that provision, the next question is the application of the doctrine. Well, that it is limited to a certain class, there is no question. It is either "laborer" or "me-
94 chanic." All the cases have held, from the early cases down to Lawrence against Fox, Seaver against Ransom, all of them have held, that in public contracts involved, and there is a class, that that is where it is invoked. Well, we have a class here. So we have a public contract, and we have a class here, which is one of those definitely covered by the case of Lawrence against Fox, and we have this plaintiff in that class—in that classification.

Now there was a recent case, your Honor—I will not discuss the history of the doctrine in Lawrence against Fox because

I think I have gone into it pretty much in my brief, but I would like to call your Honor's attention to a recent case, which I found, in Arkansas, the Superior Court of Arkansas, where a similar provision was construed—the case of H. B. Deal & Co. against Martin—and there the court stated—that was a Superior Court decision—as follows: "The fact that the Corporation operates on a cost basis, plus fixed fee basis, so that it will be reimbursed by the United States for labor cost, does not make this an action against the United States and does not prevent Court jurisdiction when a laborer sues a contractor for wages due under contract. * * * The Government placed the provision as to payment of overtime on the scale of wages fixed by the Government in the contract for the benefit of the workers. The workers therefore have a right to sue on the con-
95 tract. The Court has repeatedly held that a contract made for the benefit of a third party is actionable by such third party. The right of a workingman to sue a public contractor for wages as fixed by the wage scale in the contract, has been recognized in several cases," and so forth.

That case definitely gave a right for overtime pay to a workingman and stated that he must be paid overtime rate for overtime work. And here we have the same case, a laborer, because they have agreed to abide by the standard rate for regular time and time and a half rate for overtime. Certainly that recent case—and there are quite a few others, your Honor, which that court followed, in various jurisdictions, including cases in this jurisdiction, which hold that this is a typical case in which a third party doctrine is to be invoked.

Therefore, I say to your Honor that both causes of action should not be dismissed and that there is ample reason and authority in law and on the facts why these actions should be submitted to the jury.

The Court: Counsel, step up, please.

(Colloquy off the record at the Bench.)

The Court: I will reserve decision on the defendants' motions.

Bring down the jury.

(At this point the jury returned to the courtroom.)

96 *Eugene W. Kortjohn—for Defendants—Direct.*

Mr. Raby: If your Honor please, I would like to call Mr. Eugene Kortjohn as a witness for the defendants.

[illegible] W. Korjohn residing at 15 Corona Avenue, Pelham, New York, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Raby:

Q. Mr. Korjohn, professionally speaking, what is your occupation? A. I am a certified public accountant.

Q. And by whom are you presently employed? A. I am a partner of Martin Korjohn & Company.

Q. In addition, are you employed by the defendants? A. Yes, I am.

Q. And were you so employed in 1951? A. I took a leave of absence and went into full time employment with Foley Brothers Spencer, White & Prentis on November 19th, 1951.

Q. And have you been continuously so employed to date? A. Not in full time employment. I was in full time employment with Foley Brothers Spencer, White & Prentis up until January 31st, 1954.

Q. In what capacity have you been employed by the defendants? A. Chief accountant.

Q. Will you describe the relationship of Foley Brothers and Spencer, White & Prentis with respect to the Iran project that is involved in this action?

97

Mr. Lasker: I object to that question.

Mr. Raby: All right, I will withdraw it. I thought the jury might want to get a picture of it, but it is immaterial.

Q. Will you state your duties, in your capacity as chief accountant for the defendants, during the period you have testified to, with particular reference to the cost-plus project in Iran? A. Well, at the beginning of the job itself I dealt principally with the accounting work of the job, setting up the payroll systems, paying the payrolls, and the various requirements of the overseas and various financial requirements of the overseas and New York office employees. Later on I assumed various additional work of receiving these employees when they returned to the United States, paying them off and listening to their claims, making recommendation for adjusting their claims if I felt that an adjustment was necessary, and finally, attending to all records of the company after all of the employees came back.

Q. Were you in charge of the New York office records as to payrolls of employees engaged in the Iran project? A. I was.

Q. Did you know a Mr. Charles Sells? A. Yes, I did.

Q. Will you state what he did? A. He was foreign manager, foreign project manager. He was in full charge of the operation for the contractors at the site of work.

Q. Did Mr. Sell ever communicate with you concerning the Ivan project? A. I would say yes. I don't know that he addressed the communication to me particularly. It was all addressed to the company.

Q. Yes. Do you recognize its signature? A. Yes, I do.

Q. Now, will you state for the jury, Mr. Kostelo, the general practice of the defendants with respect to the employment of cooks for employees presented for the Ivan project?

Mr. Lessler: I object to that, your Honor. I don't think it has anything at all to do with the case at bar. There are many, many different types of employment that they employed on their project.

The Court: I will allow it.

(Colloquy off the record at the Bench.)

Mr. Raby: I withdraw that question.

Q. Mr. Kostelo, I now show you Plaintiff's Exhibit 1 in evidence and ask you to state whether or not that is a standard form printed contract of the defendants? A. Yes, it is.

Q. Was it employed with persons on this project here?

Mr. Lessler: I object to that question, your Honor.

The Court: Sustained.

Q. Was this contract confined for the use of cooks or was it used for other types of employment?

Mr. Lessler: I object to that question.

The Court: Sustained.

Q. Have you made an investigation of the defendants' books and records concerning the plaintiff in this action? A. Yes, I have checked the defendants' records concerning Filardo.

Q. I note that the contract states that Mr. Filardo was hired as a cook at $60. a week. What person associated with the defendants, if anyone, determined or negotiated the $60. a week figure?

Mr. Lessler: I object to the form of the question. I don't know what he means by "negotiated the $60. a week figure."

The Court: You mean fixed the rate of compensation?

Mr. Raby: Yes.

The Court: I will allow it.

A. Mr. S. H. Golden interviewed Mr. Filardo and recommended him for hiring at $60. per week.

Q. Were the wage rates, as determined for Mr. Filardo in particular, and for cooks in general, based on any definite standards, or were they simply the result of individual negotiations between the defendants and the plaintiff?

Mr. Lessler: I object to that question as entirely leading, your Honor. This is direct examination and counsel should not lead the witness. I object on the ground that it is entirely leading and on the substantive grounds, too. I don't see how or where it is relevant. On those grounds I object to it.

The Court: I will allow him to answer it.

A. The wage range was based upon a formula, in general, for 450 per cent of 85 per cent of the New York rates. In other words, it runs approximately 130 per cent of the New York rates of pay of similar positions. When these wage rates were fixed the individuals were hired on their own merits.

Q. Now, Mr. Kortjohn, the plaintiff has testified that there was a $75. a week minimum wage rate in effect at the project. From an examination of your books and records, will you state whether or not that is the fact? A. That is not the fact.

Q. Will you state just what was the fact? A. The fact was that the $75. rate was a maximum rate, which we were allowed to pay. Above that we were not permitted to pay the employee without going into unallowable costs.

Q. To whom do you refer when you say they were not permitted to pay more than $75. a week? A. We were not permitted to pay more than $75. per week by the War Department at the time of hiring Mr. Filardo.

Q. Did the War Department permit you to pay any less than $75. a week?

Mr. Lessler: I object to that question about what the War Department did or did not permit. I don't see where that comes into it.

The Court: Step up, counsel.

(Colloquy off the record at the Bench.)

The Court: I sustain the objection to the question.

Q. In the course of your employment, Mr. Kortjohn, did you receive any directives or communications from the War Department with respect to the matters to which you have tes-

Mr. Lessler: I object to that question, your Honor.

The Court: Sustained.

Mr. Raby: I respectfully except to your Honor's ruling.

Will you mark this for identification, please.

(Letter of War Department, dated December 19, 1941, addressed to defendant, consisting of nine sheets, marked Defendants' Exhibit B for Identification.)

By Mr. Raby:

Q. Mr. Kortjohn, I show you Defendant's Exhibit B for Identification and ask you to state to the court what it is? A. This is what is called a personnel control list, dated December 19, 1941, under which we were given permission to hire our employees.

Q. Is that a communication received by your office in the regular course of business? A. It was a communication from the War Department, North Atlantic Division, received in the regular course of business.

Mr. Raby: I respectfully offer it into evidence.

Mr. Lessler: I object to that, your Honor. That has nothing to do with cooks. There are no cooks on the list.

The Court: Step up, please.

(Colloquy off the record at the Bench.)

The Court: I sustain the objection to the admission into evidence of Defendants' Exhibit B for Identification.

Mr. Raby: I accede to your Honor's ruling with respect to the objection. No, on second thought, I respectfully except to your Honor's ruling.

Now I would like to have this paper marked for identification.

(Letter of War Department, dated January 17, 1942, addressed to defendants, consisting of two sheets, marked Defendants' Exhibit C for Identification.)

By Mr. Raby:

Q. Mr. Kortjohn, I now show you Defendants' Exhibit C for Identification and ask you to state what it is? A. This is Supplement No. 15 to the foreign personnel control list sent to us by the War Department for the purpose of—

Mr. Lessler: I object to the purpose, your Honor. He was just asked what it was.

Q. You say it was sent to the defendants? A. Yes, by the War Department.

Mr. Raby: I offer it in evidence for the sole purpose of reading that particular thing (indicating on paper).

103 Mr. Lessler: There is no objection if it is confined to just that which concerns itself with the "cook."

The Court: I will admit so much of it as refers to "cook."

Mr. Lessler: That is all right. I don't want the letter marked.

Mr. Raby: May it be deemed marked as an exhibit and then read into the record that particular portion of it?

The Court: If you read it into the record that is sufficient. Then it will be in the record.

Mr. Lessler: That's all right, just read it.

Mr. Raby: At this point I should like to read into the record an excerpt from Defendant's Exhibit C for Identification.

The Court: You may read into the record so much of Defendants' Exhibit C for Identification as counsel agree, that is, that much which relates to "cook."

Mr. Raby: Yes. (to jury): This communication is addressed to the defendants, and the particular portion I want to read to you states as follows: "Reference is made to your letters of December 30, 1941 and January 13, 1942, requesting approval of certain wage rates and authorization of additional positions to be filled by personnel assigned to overseas duties. Approval is granted as follows:" And then there is a column which takes into consideration various types of employees, and the column contains three subjects. The first is Serial

104 Number, the second is Designation, and the third is Approved Maximum Rate of Pay. With respect to cooks' and in parenthesis "all kinds", I find the maximum rate of pay "$75. per week."

Mr. Lessler: Just a moment. It just says "$75. a week, all kinds." Isn't that all it says?

Mr. Raby: Yes, that is right.

The Court: Did you give the date of that letter?

Mr. Raby: Yes, January 17, 1942. I thought I gave that date before.

By Mr. Raby:

Q. Mr. Kortjohn, some of the contracts with employees provide specifically for overtime payments?

Mr. Lessler: I object to that question, your Honor.

Q. Now will you state, Mr. Kortjohn, what your records show as to the classification and pay of the plaintiff at the time of his first employment by the defendants?

Mr. Lessler: If your Honor please, I think we have that in the contract, and the contract is in evidence. I don't think we need go into it any further. It is repetitious.

The Court: I will allow him to show it.

105 A. Mr. Filardo was hired by us on February 14, 1942, and effective on February 16, 1942 he received a rate of pay of $60. per week. That rate of pay continued

Mr. Lessler: Just a moment. I think that has been answered.

Mr. Raby: All right, that is enough.

Q. Will you state whether or not your records show subsequent changes in pay or classification of the status of the plaintiff? A. They do.

Q. Will you state what those changes were? A. Effective on the 7th of September, 1942, he received an increase in rate from $60. to $70. per week. Effective on the 4th of January, 1943, he received an increase in rate to $95. per week. And this was accompanied by a change in classification to "head cook." I believe it was on March 8, 1943 he was changed back to $60. per week, and he left our employ on the 9th of June, 1943, when he returned to the United States.

Q. Do your records show the existence of any contracts other than the one that the plaintiff entered into with the defendants which you have previously referred to in your testimony? A. I have searched my files and I can't find any such record. I do find that he had an extension agreement extending his original contract.

Q. Have you got it? A. I thought I had it. I am sorry, I don't seem to have that record here.—Oh, yes, here it is (exhibiting paper).

Q. Can I have it? A. Yes.

Q. Is it all right if I tear it off from the folder of papers? A. Yes.

Q. All right.

Mr. Raby: Will you mark this paper for identification, please.

106 (Paper entitled "Extension Agreement," dated October 21, 1942, above referred to, marked Defendants' Exhibit D

Q. I show you Defendants' Exhibit D for Identification. Is this the paper to which you referred in your testimony? A. That is correct.

Q. Do you recognize the signatures appearing thereon? A. Yes, I do, all three of them, Charles H. Sells, Frank P. Filardo, and E. B. Simmons—Everett Brooks Simmons.

Mr. Raby: I offer it in evidence.

Mr. Lessler: No objection.

(Defendants' Exhibit D for Identification, being paper entitled "Extension Agreement," dated October 21, 1942, now received in evidence as Defendants' Exhibit D.)

By Mr. Raby:

Q. Mr. Kortjohn, will you state whether your records would disclose any absences from work by Mr. Filardo, the plaintiff? A. Of all types? You mean with and without pay?

Q. Of all types. I just want a "yes" or "no" answer to that. A. Yes, my records do show that.

Q. Will you state what your records show in detail as to the absences of Mr. Filardo from work?

Mr. Lessler: If your Honor please, I object to that question
107 unless they claim that there is any difference in what we claim. We have given them credit for everything that they claim, all the way through, and so I don't see that there is any use of going all through it.

Mr. Raby: Well, I want to get it in the record.

The Court: He is entitled to have it in the record.

Mr. Lessler: It is all right with me.

Q. Mr. Kortjohn, do you recall an examination before trial of yourself on or about March 19, 1945? A. Yes, on February 5, 1945.

Mr. Lessler: Yes, that's right, that is when it was taken, on February 5th.

Mr. Raby: Yes.

Q. And did that examination of you set forth the general substance of what your records showed concerning the absence of the plaintiff from work? A. It did, yes.

Mr. Raby: I offer in evidence, as Defendants' Exhibit E, the original examination before trial of Mr. Kortjohn.

Mr. Lessler: No objection.

(Examination before trial of Mr. Eugene Kortjohn, taken on February 5, 1945, above referred to, received in evidence and marked Defendants' Exhibit E.)

108. Q. Mr. Kortjohn, will you please state, in summarized form, the total days of absence of Mr. Filardo from work on the project? A. Of what type? Of all types?

Q. Of all types. A. Mr. Filardo arrived at the base—

Mr. Lessler: I object to that. He is not answering the question.

The Court: Just give us the total number of days that he was absent.

The Witness: I am sorry, sir.

A. (Continuing)—He was absent at the base—

The Court: Just give us the dates of absences or the total number of days he was absent at the base.

Q. From the date of his arrival at the base. A. The records show that Mr. Filardo did not work on Sunday the 5th of April, 1942;—

Q. May I interrupt, please. I believe his Honor just wants the total number of days he was absent.

Mr. Raby: Is that correct?

The Court: Yes.

Mr. Lessler: I have 67 days. I think that is sufficient. I have added them up and it amounts to 67 days.

Q. Would 67 days be correct, Mr. Kortjohn? A. No.

Mr. Lessler: Well, then, how many days is correct?

109 Q. Well, how many days is correct, if 67 days is not correct? A. 92.

Q. Are those figures substantiated by your examination before trial?

The Court: What period does that cover?

Q. What period does that cover? A. That covers from February 16, 1942 to June 9, 1943.

Q. But he wasn't at the base until April 1st, isn't that correct? A. He had no absences between the time he left New York and the time he arrived at the base, and the time he left the base and the time he arrived in New York.

By the Court:

Q. Does that include the transportation time? A. No, the 92 days does not include that.

Q. He was absent 92 days from the date he arrived at the base until he left? A. That is correct. That includes the time he was sick and the time he lost for reasons of his own misconduct.

By Mr. Raby:

Q. Now, Mr. Kortjohn, I call your attention to the complaint which states that the plaintiff worked from April 1, 1942 until December 31, 1942, for a total of 3,430 hours, and that of that 2,030 hours are alleged to be overtime.

Mr. Raby: I will later taken into consideration the fact that you amended your complaint yesterday, Mr. Lessler.

110 Q. (Continuing.) I now ask you to refer to your records and tell me the total number of days in that period of time? A. 275 days from April 1, 1942 to December 31, 1942, inclusive.

Q. Subtracting the number of days that you have testified that Mr. Filardo was absent from 275, leaves how many days? A. I am sorry. I testified before as to the number of days in the total period. Now you are asking about the year 1942.

Q. I see. Well, will you state how many days he was absent between April 1, 1942 and December 31, 1942, if you can? A. He was absent, without authorization, 27 days in 1942. He was ill, for excusable causes, for 40 days.

Q. I see. That would be 67 days? A. 67 days.

Q. Would you— A. Excuse me. He also had days when he was not on duty—that was usually on Sundays—of 37 days. I don't know whether you would call that absence or not. He was not on duty and not on call for duty.

Mr. Lessler: I object to that, your Honor.

The Court: Step up, please.

(Colloquy off the record at the Bench.)

Q. Mr. Kortjohn, the record, to which you referred, were they kept in New York or were they kept at the base? A. The records, to which I am now referring, were kept at the base.

Q. And were they subsequently returned to New York? A. Yes, they were, along with all of the other files of the company.

111 Q. Were you in charge of receiving and examining the payroll records that were sent from the base to New York? A. I was.

Q. And you are familiar with the handwriting of the persons who made the entries in the records? A. No, I don't know whose handwriting this is in.

Q. But they were received in the course of your dealings through the mail? A. No, they were sent back in the custody, I believe, of

Mr. Glass who was given custody of the records when coming back from Iran.

Q. Were independent records kept in New York concerning the work of employees at the base? A. Yes, independent payroll records because there was a very substantial lag in time between the time that the records could be shipped from out there to New York. It was a lag anywheres up to thirteen weeks.

Q. How did you keep your New York payroll records? Where did you get the information on which you kept your New York payroll records? A. Out of letters sent by the office, regular letters sent by the office from the base.

Q. Did you prepare the New York payroll record, in the case of Frank Filardo, in the regular course of business? A. I did.

Q. In your own handwriting? A. No. I supervised the preparation of all the payroll records.

Q. Have you compared the New York payroll record, as to Filardo, with the Iran payroll record? A. I have.

Q. Do they concur in all respects? A. Yes.

Mr. Raby: I now offer them both in evidence as a single exhibit.

112 Mr. Lessler: I object to that. May I examine the witness with respect to these records?

The Court: Yes.

Mr. Lessler: Now which is the foreign record?

The Witness: The white and green cards, the large cards.

Mr. Lessler: Now, with respect to these white and green cards, is there anything on there with the signature of the plaintiff or the handwriting of the plaintiff?

The Witness: No.

Mr. Lessler: And are all the entries made by some person at the base?

The Witness: Yes.

Mr. Lessler: But you yourself have no knowledge of these entries, of the actual truth of these entries?

The Witness: No.

Mr. Lessler: Now, isn't it true that these entries have him down for eight hours work every single day, Sundays excepted? Isn't that true, a flat eight hours each day, uniformly?

The Witness: There is an "8" shown in the column where the number of hours would be marked, yes.

Mr. Lessler: And are those the actual hours which he worked?

The Witness: I don't know. I wasn't there.

Mr. Lessler: Well, isn't it a fact that these records are merely a form and that the truth of the matter is that he

113 may have worked more than eight hours a day and that that is not the actual record of the hours he worked?

The Witness: That is true, and he might have worked less than eight hours a day.

Mr. Lessler: No, not that "he might have." This is merely a form, isn't that right?

Mr. Raby: Objection, your Honor, on the ground that the witness has stated he doesn't know.

The Court: Overruled.

Mr. Lessler: Is it a form?

The Witness: It is a form.

Mr. Lessler: And is it a fact that you testified in your examination before trial concerning those same records?

The Witness: Yes.

Mr. Lessler: And did you in that examination before trial, when you were asked the following questions, give the following answers:

"Q. Do you know whether he worked more than 48 hours a week as set forth in your weekly time sheet? A. I don't know.

"Q. Would you say then that he might have? A. There is a possibility that he might have worked over 48 hours some weeks. He was subject to call at any of the 168 hours of the week.

"Q. Then the weekly time sheet is merely just a matter of form rather than the actual hours he might have worked? A. That is true."

114 Now, didn't you give those answers to those questions?

The Witness: Yes.

Mr. Lessler: And aren't those the very same records that you had reference to?

The Witness: That is true.

Mr. Lessler: So, these eight hours every day, then, is merely a matter of form, and not the actual hours worked, isn't that so?

The Witness: That is true.

Mr. Lessler: Well, sir, I object to these records being received in evidence.

Mr. Raby: Your Honor, I am not offering these records to show the number of hours worked. I am offering them in evidence to show the number of days absence. The contract, on its face, shows that he is not entitled to any overtime. So, the mere fact that he was put down for eight hours a day is wholly immaterial and the fact that he might have worked more than eight hours a day is also immaterial.

Mr. Lessler: I was not reading from these records because they are inaccurate, and I submit that its introduction is improper.

Mr. Raby: I object to the characterization "inaccurate." I don't think that is necessarily true. I submit, sir.—

The Court: Well, I will receive them in evidence for the purpose for which they are offered, to-wit, to show the days on which the plaintiff was absent.

Mr. Lessler: They apparently do not include Sundays,
115 as a matter of form. Just that they did not include Sundays as a matter of form, which is not accurate, of course. They just gave him 48 hours a week. That isn't true either. That is why I say the entire record is just a form. They had to give him 48 hours a week to satisfy the New York office.

The Court: This shows him working on some Sundays. I will receive them for the purpose for which they are offered, to show the days that he was absent during the period. You may inquire into it further on your cross-examination.

Mr. Lessler: Well, I object to that, your Honor, as clearly a form matter. And those that do show Sunday work, they don't have his entire working hours. They show that he only worked six days a week. The whole record is clearly something for the New York office, and certainly is not an accurate record.

The Court: Which are the records which were taken and kept at the base?

The Witness: The ones that you were looking at, the white and green cards.

The Court: Were they kept in the regular order of business, to show days not worked?

The Witness: They do.

Mr. Lessler: Well, are they accurate as to those days not working?

The Witness: I have no personal knowledge of that.

Mr. Lessler: Well, whatever it is, that is on there, would you say that it is about the same accuracy as to the hours worked?

116 The Court: I don't understand that question, sir.

Mr. Lessler: I mean, are they any more accurate, as to Sundays?

The Court: He says he doesn't know? He wasn't sure.

Do I understand you to say that they were kept in the regular course of business at the base, to show actual days worked by the plaintiff?

The Witness: That was the purpose of those records, your Honor.

The Court: Do you know that they were kept for that purpose?

The Witness: Yes.

Mr. Lessler: Well, do you know whether they actualiy reflected that purpose?

The Witness: That was the purpose for which they were set up. I don't know. I was not there.

The Court: You can save your questions, Mr. Lessler, on your cross-examination. Let them be marked. Objection overruled.

(Three "Time Roll" cards and two "Payroll" records, above referred to, received in evidence, as one exhibit, and marked Defendants' Exhibit F.)

By Mr. Raby:

Q. Mr. Kortjohn, subtracting the number of days that you have testified that the plaintiff was absent from 275 days, leaves how many days? A. 171 days.

117 Q. Mathematically, how many hours a day would a man have to work a total of 3,430 hours in 171 days? A. It would be 20.06, I believe. I have the computation here. He would have to work very slightly over 20 hours per day.

Q. Now, Mr. Kortjohn, have you investigated the records of the company as to what other cooks on the Iran project got? A. As pay?

Q. Yes. A. Yes, I have.

Q. Will you state what your records show—I will withdraw that.

Q. How many cooks were there on the project? A. There were 26 cooks.

Q. Will you state what each of those 26 cooks got as a starting salary? A. John Alexander, $75. per week. Robert Louis Bach, $60. per week. Theodore R. Browning, $75. per week. Francis J. Connolly, $60. per week. Joseph Fivel, $65. per week. John Hanks, $75. per week. John Tom Holmes, $75. per week. John J. Lenahan, $75. per week. Carl Jensen, $75. per week. Peter Loleas, $60. per week. John M. Menzies, $60. per week. Thomas Martin Mills, $75. per week. Joseph Ms Montello, $60. per week. Myron Henry Morris—well, he was an assistant cook and he got $50. per week. Frank Olszewski, $75. per week. John Robert Patterson, $60. per week. Antonio Santos, $75. per week. Harry P. Sharkey, $65. per week. George U. Silver, $75. per week. Robert J. Valentine, $60. per week. Andre Vandenbos, $75. per week. Anton Winkler, $75. per week. Nick Yoannides, $75. per week. And Mr. Filardo, I don't think I mentioned, obviously $60. per week—yes, Mr. Filardo, $60. per week

Q. Did you have anybody employed with the classification as "chief cook" at the beginning of this Iran project? A. Yes, we had two.

118 Q. Two chief cooks? A. That is correct.

Q. What were they paid as a starting salary? A. Theodore R. Browning, $75. per week. I don't see the other one.

Q. But to the best of your recollection, there were two, is that correct? A. That is correct.

Mr. Raby: No further questions.

The Court: Will you be very long in your cross-examination?

Mr. Lessler: Not very long.

The Court: All right.

Mr. Lessler: May I proceed with my cross-examination?

The Court: Yes.

Cross Examination by Mr. Lessler:

Q. You said that you endeavored to pay a wage rate of 130 per cent of the New York rate? A. It was roughly 130 per cent. It was an attempt to arrive at a formula for paying these employees, which was originally based on 150 per cent of 85 per cent—I think that is 127½ per cent—of the New York rates.

Q. All right. Now what was the New York rate? How much did a second cook or an assistant cook get in New York, do you know? A. I don't know.

Q. Well, you have testified as to the various rates of cooks. Well, would it be $40. a week, $50. a week?

The Court: He said he does not know.

Mr. Lessler: Well, if he doesn't know, then I object to all his testimony on the question of cooks, your Honor.

119 The Court: No. He only testified as to the formula that was applied.

Q. Do you know what work those cooks did who got $75. a week? A. No.

Q. Do you know whether they were first cooks? A. They were not first cooks.

Q. You know that they were not first cooks? A. They were not. There were no first cooks.

Q. Were there any cooks that worked alone without any assistance, that you know of? A. I don't know. I wasn't there.

Q. Didn't you have a classification—I will withdraw that.

Q. Do you know what made you pay a cook $75. a week as opposed to $60. a week? A. No, I don't know. I did not hire them.

Q. Well, were all the cooks, were they exactly all considered cooks

of every sort, with the exception of the two chiefs that you mentioned? A. With the exception of the two chief cooks, all were just cooks, and in that original listing, the early listing, before this January 17th letter was gotten up, there were some that were called "assistant cooks."

Q. They were assistant cooks? A. Yes.

Q. So, there was a classification, isn't that right, prior to January 17th? A. There was a classification of "assistant cooks," yes.

Q. And at that time you had different rates of pay, isn't that right? A. That's right.

Q. Well, what was a first cook getting at that time? A. The chief cook?

Q. No. You say you had assistant cooks then. A. And chief cooks.

120 Q. And chief cooks? A. That is correct.

Q. Well, how much was an assistant cook getting? What were assistant cooks getting? A. Mr. Myron Morris, that I read off there, was getting $50. a week.

Q. Is that the only assistant cook? A. That is the only one I saw on that list there.

Q. You say that the classifications then was chief cooks and assistant cook, is that right? Is that the classification? A. Up to January 17th.

Q. Then you also had cooks, isn't that right? A. Assistant cook, and cooks, up to January 17th.

Q. That's right. And then you had a chief cook at that time too, isn't that right? You had three classifications? A. No. Chief cook and assistant cook up to January 17th. After January 17th we had cooks, all kinds; no distinction between any of them and no grades.

Q. Was there any distinction with regard to the work that they were to do? A. I don't know.

Q. Was it possible, or isn't it true, that those cooks, of all kinds, included first cook, second cook, or first cooks and assistant cooks? Isn't that what that classification means? A. You are asking for a possibility. It is possible.

Q. Well, isn't that what was hired, cooks and assistant cooks, under that same classification? A. No. Cooks were hired under that classification.

Q. And those who could do the work of assistant cooks, isn't that right? A. I didn't get your line of question.

Q. Let me put it this way. You didn't pay them all the same amount of money, did you? A. No.

Q. You paid them different moneys? A. That's right.

121 Q. And that was determined by what work they could do, is that right? A. What we thought that they could do, that's right.

Q. That's right. And if they were regarded as top cooks in their classification they got $75, isn't that right? A. No. If they could not be brought to work for $80 a week, they got 65; if they could not be brought to work for 65, they got 70. It was a bargaining proposition.

Q. So you say it was entirely a bargaining proposition, is that right? A. That is as far as I could tell you.

Q. And the work that they all did was the same when they went over? A. Yes, that's right.

Q. And they were all hired for the same work, is that right? A. From what I can determine.

Q. Did you actually do the hiring? A. No.

Q. Now, with respect to the records, these records that were introduced into evidence, they show a uniformity, do they not, of one day a week absent, only working six days every week? Isn't that what they uniformly show? A. No.

Q. I mean, where there is a full week's work, they always have a one day's absence? A. That is not completely correct.

Q. It isn't? A. No.

Q. Look at them. A. For the week ended August 23rd, he worked seven days.

Q. Let me see it. A. (handing card to Mr. Lessler).

Q. What does that "8x" on it mean? A. That you will have to ask Mr. Harris.

Q. Well, you have him down here for only 48 hours work for the week and you have an "8x"? A. Well, sir, I can't testify directly on that.

Q. You can't testify on that? A. I know what it is but I am not in a position to testify on it.

122 Q. Well, is there any other week, of all the weeks that he was over there, that is similarly marked? A. For the week ended September 13th.

Q. And what happened there? A. He was sick on Monday and he worked the following six days.

Q. That's right. So, he was one day out, isn't that right? A. No, that is not correct, there is not one day out. There is six days that he worked. The one day extra which he was, we will call, on sick leave, it was given as due him.

Q. Well, he did not get paid any more, did he? A. He did not get paid any more.

Q. And he did not get paid for more than six days that week? A. That's right.

Q. Is there any other place in that record that he worked seven days a week? A. No.

Q. Well, did you hear the testimony of Mr. Ebret and Mr. Filardo that he, Filardo, worked Sundays regularly, like any other

day, except when he was sick? Did you hear that testimony? A. I heard it.

Q. Would you say that that wasn't true? A. I wasn't there.

Q. You don't know? A. I don't know.

Q. It might have been true despite those records, isn't that right? Isn't that right? A. It might have been, yes.

Q. Do you know that when he put in for overtime there was no denial of the fact that he did work overtime despite those records? Do you know that? A. I know that.

Q. They only did not want to pay him, that's all, isn't that right? A. We had no reason to pay him.

Q. Well, that is another question. So, therefore, with re-
123 spect to that, those records that show 48 hours every week is incorrect, too, isn't that right? A. I am sorry, I did not get your full question.

Q. With respect to the showing that he worked only 48 hours a week, not more than that, some weeks less, is incorrect as an actual reflection of what he worked hours. Isn't it a fact that the hours, as reflected in those records, showing 48 hours a week, are also incorrect? A. Well, I don't think that record shows that he was working 48 hours a week. I think those records show that he got credit for that amount of time.

Q. I see. The records only show that he was paid for 48 hours a week work, isn't that true? A. The records show that he got credit for that time.

Q. And he did not get any credit on the records for overtime, isn't that so? Isn't that what your records show? They ignored him. A. That is correct.

Q. All right, sir.

Mr. Lessler: That is all.

Mr. Raby: No further questions.

(Witness excused.)

The Court: We will recess now until two o'clock. And I again ask the jurors not to discuss this case among yourselves nor with others.

RECESS.

124 AFTERNOON SESSION.

2:00 P. M.

The Court: Counsel, step up, please.

(Colloquy off the record at the Bench.)

Ruling on Motion to Dismiss

The Court: I grant the motion to dismiss as to the first cause of action. I deny the motion to dismiss as to the second cause of action.

Mr. Raby: I respectfully except.

At this point I would like to call as the defense next witness James C. Harris.

JAMES C. HARRIS (residing at 2700 Connecticut Avenue, Washington, D. C.), called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Raby:

Q. Mr. Harris, what is your occupation? A. At the present time?

Q. Yes. A. I am with the military construction office, Chief of Engineers, as an accountant; that is, the War Department.

Q. Were you connected with the defendants' Iran project? A. Yes.

Q. In what capacity, sir? A. As head of the War Department administrative forces in the Iran district.

Q. As such, were you employed by the defendants or by the War Department? A. I was employed by the defendants but subject to the direct supervision of the district engineer.

Q. Will you state, briefly, your duties in that capacity? A. Well, as chief administrative assistant to the district engineer, it was my responsibility to collaborate in the formulation of the procedures and policies and the establishment of a system of internal control within the contractors administrative forces on a cost-plus fixed-fee project. It was an administrative audit of a cost-plus fixed-fee contract.

Q. To whom were you responsible? A. Directly to the district engineer, who was a colonel in the United States Army.

Q. What position did Charles Sells occupy? A. He was the foreign project manager for the Foley Brothers-Spencer, White & Prentis organization, who were the co-adventurers on the Iran project.

Q. Did you, in your capacity, as stated, have anything to do with respect to the employment of personnel on the base at Iran? A. None, except the selection of those employees considered a part of the district engineer's staff.

Q. Did you have anything to do with the question of whether or not raises in pay or charges in classification should be given?

Mr. Lessler: I object to that question in view of your Honor's ruling, the question of classification or raises in pay. That is not important right now.

Mr. Raby: I will withdraw the question.

Q. Would you know from your duties, as stated, how many cooks were engaged on this Iran project?

126 Mr. Lessler: I object to that question. I don't see the relevancy of it to the issues now before the court.

The Court: I will let him answer it.

A. I couldn't state exactly at any one time how many cooks were on the project. There were approximately 25 employed over the life of the project.

Q. Did you know Frank Filardo, the plaintiff in this case? A. Yes, casually. I knew him by name and when I saw him I could identify him. I had spoken with him a few times.

Q. Can you state what the general working hours of cooks on the Iran project were?

Mr. Lessler: I object to that question, your Honor.

Mr. Raby: He was there, your Honor, and he should be able to tell us.

Mr. Lessler: I object to what the general working hours prescribed was as not important.

The Court: It is a question as to how long this plaintiff worked. I sustain the objection.

Mr. Raby: I respectfully except, your Honor.

Q. Have you heard the testimony of the plaintiff in this action? A. Yes.

Q. Do you recall his testimony as to the number of hours he averaged while he was engaged by the defendants? A. I do.

Q. From your personal knowledge, can you state whether or not the claim as made by the plaintiff is correct or incorrect?

127 Mr. Lessler: I object to that. That calls for a conclusion, your Honor.

The Court: Sustained.

Q. Can you state from your personal knowledge what the average working hours of the plaintiff were? A. I would say that his hours were governed by the established week work.

Mr. Lessler: I object to that answer, your Honor, as not responsive. That is not a responsive answer.

The Court: It is not responsive. Strike it out. He can testify only as to what he knows of the working hours of this plaintiff.

Mr. Raby: If your Honor please, the plaintiff has testified that he had worked overtime and more diligently than certain other cooks, and therefore I respectfully submit that the general hours for other cooks is pertinent to the issues.

The Court: His claim, as I understand it, is overtime. You may have any witness testify, if he can, as to the number of hours the plaintiff worked.

Q. Well, now, who was Filardo's immediate superior, do you recall? A. At which time?

Q. Well, I will divide the question in two parts. First, at Ahwaz, when he was at Ahwaz. A. He was there such a short time. Tom Brady was the man in charge. He was the commissary manager. So, he couldn't have been anything other than his immediate superior, he ran the mess.

128 Q. Was Mr. Brady a cook? A. No. Mr. Brady was a road superintendent. He was doing an emergency job then, as commissary manager, pending the arrival of the regular commissary steward on the job.

Q. Now, the second part of my question is Karkheh River. Who was Mr. Filardo's immediate superior there at Karkheh River? A. The camp manager, who would naturally be his immediate superior, was Mr. Burt Simmons, for a short period of time; and he was then relieved and Mr. Horace M. Farthing assumed command of that camp.

Q. Under the administrative set-up, as it was when you were there, to whom would Mr. Filardo have to go with respect to a question of claims for overtime?

Mr. Lessler: I object to that question, your Honor.

The Court: Counsel, step up, please.

(Colloquy off the record at the Bench.)

Mr. Raby: I withdraw the question.

Q. Do you know, Mr. Harris, how many cooks were at Karkheh River when Mr. Filardo was at Karkheh River? A. Not for the entire period of his duty there, but there were two cooks at Karkheh River for quite a long time.

Q. Can you be more specific as to that? A. No, I am afraid I couldn't.

Q. Did you have occasion to eat at the mess hall at Ahwaz and at Karkheh River at any time? A. I took practically all of

129 my meals at Ahwaz. I was out on an average of about once a month and I had dinner at various camps, or lunch.

Q. Did you eat at the Karkheh River Camp while the plaintiff was employed as a cook there? A. During that period of time, yes, but I don't remember seeing him at the time I had a meal there.

Q. Did your office control the hours of the opening and closing of mess halls? A. No. That was left up to the commissary manager. He worked by the week during the entire project.

Q. And what did that work week consist of?

Mr. Lessler: I object to that, your Honor. He claimed he had no control over the opening and shutting of the mess halls.

The Court: Sustained.

Mr. Raby: All right.

Q. Did you eat at the Ahwaz mess hall while the plaintiff was there employed? A. I don't remember seeing him at Ahwaz at all. He came through there on the way camp, when they were moving men from Um Quasr over to Iran—on their way over to work in Iran—but I don't remember seeing him at Ahwaz at all. I understand he was there but I did not see him.

Q. Will you state what the bill of fare was at the mess halls at Ahwaz and at Karkheh River? A. Generally, yes. We had most of the time powdered eggs—I am speaking about at Ahwaz now—not Karkheh River, which I can't state definitely what it was at Karkheh River, but it should have been consistent through the entire project because it was controlled centrally from Ahwaz. We had—

130 Mr. Lessler: One moment. I ask that the last part of the answer be stricken out, what it should have been.

The Court: Strike it out.

A. (continuing)—Powdered eggs, and always a fruit juice, bread, marmalade, bacon or sausage, and coffee.

Q. How about fresh meat? Was fresh meat served? A. It was up until about, I think it was the latter part of August or early September when —

Q. Of what year? A. 1942, when the consumption of all fresh meats was condemned and prohibited by the United States medical authorities, and that is a matter of official record in the Surgeon General's Office in Washington.

Mr. Lessler: I object to that, your Honor, unless he knows specifically that it was not served at different camps.

The Witness: If it was served, it wasn't authorized.

Mr. Lessler: Well, I object to the question and answer, your Honor, and ask that the answer be stricken out as he is only reciting general orders, not what actually was done.

The Court: Step up, counsel, please.

(Colloquy off the record at the Bench.)

The Court: Strike out after "I think it was the latter part of August or early September of 1942."

131 *By Mr. Raby:*

Q. In the regular course of your duties, Mr. Harris, did you have occasion to examine the payroll records of Filardo and the other employees on the base?

Mr. Lessler: I object to that. I don't see the relevancy of it. We have the payroll records.

Mr. Raby: Yes, but you challenged the accuracy of the payroll records.

The Court: I will allow him to answer it as to whether he examined them.

A. We examined and approved all payrolls prior to their being paid. That was one of our responsibilities. We audited them.

Q. I call your attention now to the large white and green sheets or cards, forming part of Defendants' Exhibit F in evidence, and ask you to state whether or not those records were made in the regular course of business of the defendants?

Mr. Lessler: I object to that. I think we have that, your Honor. The records are in evidence. I object to any further questions concerning its admissibility.

The Court: On that basis they were admitted in evidence.

Mr. Lessler: They were admitted for a limited purpose on that basis.

Mr. Raby: But I want to tie it up with someone who was actually on the scene of the project. However, it makes no difference to me. I will withdraw the question. I have no further questions.

132 *Cross-examination by Mr. Lessler:*

Mr. Harris, you say you were located where? Where was your office? A. In Ahwaz.

Q. And you were there for how long? A. I was there for a total, I think it was, eighteen months.

Q. And what was your position there or your duties? A. I was head of the War Department administrative forces of the district engineer's staff.

Q. And what did the district engineer's staff consist of? A. The district engineer was the contracting officer. He had to pass upon not only the operation but the administrative end of the contractor's work. It was a cost-plus fixed-fee contract. Therefore, everything with the contractors was subject to the approval of the War Department or the contracting officers' representative with the War Department.

Q. You were there as a representative of the War Department, is that the point? A. That's right.

Q. And you were there as an auditor? A. That's right.

Q. And your work mainly consisted of going over records, is that right? A. No. My work consisted of the supervision of the administrative forces of the Government. I was the chief administrative assistant to the district engineer. I did very little routine work.

Q. What did you do then in the line of your duty? A. Mine was the responsibility for the application of broad policies and procedures as laid down by the War Department.

133 Q. I see. So you did not concern yourself with the individual hours of the men, did you, if they worked overtime or did not work overtime, and check upon them? A. No. The only thing I passed on was the approval of the records.

Q. You just passed on the records as you saw them, is that right? A. That's right.

Q. So that, so far as the individual hours of work is concerned, and so forth, that was left to those in charge of that individual's base? A. No, it was left to our office.

Q. But as far as the accuracy of the hours is concerned, when they were handed in who passed on that? A. The timekeeper of the contractor.

Q. I see. When you were at Ahwaz did you personally keep tab of how many hours the men worked? Did you watch that? A. No, but my auditors did.

Q. All right, that is an answer, "No." Did you watch Mr. Filardo in particular as to how many hours he worked? A. No, I had no reason to.

Q. Therefore you don't know, isn't that right, how many hours he worked in Ahwaz? A. No.

Q. Now, as far as Karkheh River is concerned, you say that you had a meal there, is that right? A. Yes, I had one meal there.

Q. And that was during the seven or eight months that Mr. Filardo was there? A. That's right.

Q. And you don't know how many hours he worked there either, do you? A. No.

Mr. Lessler: That is all.

Mr. Raby: No further questions.

(Witness excused.)

134 Mr. Raby: The defendants rest.

Mr. Lessler: The plaintiff rests, your Honor.

Renewal of Motion to Dismiss

Mr. Raby: If your Honor please, I now formally respectfully renew the motion to dismiss the second cause of action on the

ground that the proof has failed to show that there was any rendering of overtime work at the instance and request of the defendants, and on the further ground that, as a matter of law and of fact, even if such request had been made, there is no right of action for such overtime on the basis of time and a half for overtime.

Motions for Directed Verdict

Mr. Lessler: If your Honor please, I move now for a direction of a verdict in favor of the plaintiff on the second cause of action. There is no evidence by the defendants whatsoever as to the overtime hours put in by the plaintiff. All the evidence on their part concerned with the plaintiff's classification. The only evidence we have before this court on overtime is the evidence of the plaintiff that he worked overtime. Even their last witness admitted that he did not know, and their previous witness, Kortjohn, did not concern himself with that. The thing or record that was allowed in evidence was allowed in for the limited purpose only of showing his absences, not his hours.

Mr. Raby: If your Honor please, I move for a direction of a verdict in favor of the defendants. I join in the motion for a direction of a verdict.

Denial of Motions

The Court: I will deny defendants' motion to dismiss the second cause of action. I hold that plaintiff was a laborer under Article 40. Article 40 applies beyond the limits of the United
135 States. The plaintiff has a right to bring this action.

Mr. Raby: I respectfully except.

The Court: I will deny both of your motions for a directed verdict.

Mr. Raby: I respectfully except.

The Court: You may sum up.

(Mr. Raby, on behalf of the defendants, summed up to the jury.)

(Mr. Lessler, on behalf of the plaintiff, summed up to the jury.)

The Court: Before charging the jury, I want to speak to counsel.

(Colloquy off the record at the Bench.)

The Court: Step up, Mr. Rieger.

(The following was dictated to the stenographer at the Bench, in the presence but not in the hearing of the jury:)

Stipulation

The Court: It is stipulated by respective counsel that plaintiff worked 42 weeks at $60. per week, a total of $2,520.; 20 weeks at $70. per week, a total of $1,400.; 12 weeks at $95. per week, a total of $1,140., a grand total of 74 weeks, $5,060.; that the average weekly wage was $68.28; that the average hourly rate was $1.42; that the time and a half rate is $2.13 per hour.

So stipulated?

Mr. Lessler: Yes.

Mr. Raby: Yes, sir.

136 (The Court thereupon charged the jury as follows:)

Charge to Jury

The Court (Nathan, *J.*): Members of the Jury:

Plaintiff sues to recover compensation, computed at one and a half times his hourly rate, for work performed in excess of eight hours per day.

It is not disputed that defendants were contractors for the Federal Government on war construction projects in the Middle East; that in February 1943 defendants, by written contract, hired plaintiff as a cook at a salary of $60. per week; that thereafter plaintiff proceeded to defendants' projects in Iraq and Iran and performed all the services that were required of him; that plaintiff worked a total of 74 weeks, including the time of his transportation; that he received an average weekly wage of $68.38 for the entire period; that plaintiff requested to be paid for overtime but did not receive any payment for it; that his average hourly rate, based on a 48-hour week, was $1.42, and that his average overtime rate, if any, was $2.13 per hour.

There are other facts, however, that are sharply contested.

Plaintiff claims that during most of the time that he worked on the projects he worked greatly in excess of eight hours per day; that he customarily had worked for sixteen to eighteen hours a day, and that he computes his total overtime at 1996 hours.

Defendants resist the plaintiff's claim. Defendants contend that plaintiff was not entitled to be paid for any overtime, and that he did not work overtime to the extent that he claims.

137 I have tried, very briefly, to outline the contention of each side to this controversy. If any reference by me to matters of evidence does not coincide with your recollection, your recollection, not mine, is to control.

You are not to assume that the denial or the granting of defendants' motions to dismiss the complaint, or for a directed verdict, or the denial of plaintiff's motion for a directed verdict, reflects any opinion that the Court may have upon the facts. The Court

has no opinion on the facts. The denial of the motions merely means that, in the opinion of the Court, there are in this case questions of fact for you, the jury, to determine.

You have seen the witnesses, you have heard their testimony, you have noticed their demeanor upon the witness stand, and it is for you to say what weight should be given to their testimony and which of the witnesses you would believe and which, if any, you would refuse to believe.

You must examine into the interest of the witnesses and determine whether their interest, if any, has caused them, or any of them, in any way to distort their testimony. If you believe witnesses you must give full weight to their testimony. If you believe that any witness has willfully testified falsely as to any material fact in the case you may, if you choose, disregard the whole or any part of the testimony of such witness.

You must render your verdict in this case solely upon the evidence before you. In that connection, I instruct you that any statements made by counsel are not evidence. You must consider only the testimony of the witnesses and the documents that are in evidence. You may draw reasonable inferences from the
138 facts in evidence but no such inferences may be drawn from the statements of counsel.

As this case comes to you for your consideration, any questions as to the nature or value of plaintiff's services have been disposed of. The only issue is one of overtime.

Under the laws applicable to the facts in this case, plaintiff is entitled to be compensated for such work as he performed in excess of eight hours per day, six days a week, and the amount is to be computed at the rate of one and a half times his regular hourly rate of pay.

The questions for you, the jury, to determine in this case are: Did the plaintiff work overtime? If so, how many hours in excess of eight hours per day did he work during the entire period of his employment?

If you find for the plaintiff you must then compute the amount due him by multiplying the number of overtime hours which you find he worked by $2.13, which is the average time and a half rate.

The burden of proof in this case is upon the plaintiff and he must establish his contention by what we call a fair preponderance of the credible or believable evidence, that is, the evidence in plaintiff's behalf must outweigh the evidence opposed to it or given against it. This, however, does not necessarily mean that the plaintiff must have the greater number of witnesses, but refers only to the quality of the evidence, not to the quantity.

If the evidence is evenly balanced then the plaintiff has not sustained the burden of proof and your verdict would have to be for the defendants.

139 If, after a careful review of the evidence, you conclude that plaintiff has not sustained the burden of proof as the law requires, your verdict will be for the defendants.

If, however, you believe that plaintiff has sustained this burden, then, and then only, you may award to plaintiff a sum, in dollars and cents, to compensate him for the number of hours you find that he worked overtime, computed at the time and a half rate of $2.13 per hour.

You may find that he worked less but not more than 996 hours. Consequently, any verdict you may find for the plaintiff may be less but not more than $4,251.48.

In every case tried in this court it is the duty of each juror to discuss the evidence with the other jurors, to try by means of argument to reconcile differences of opinion, if any existing among the jury, and to make an effort to agree upon a verdict. You must keep your minds on the evidence and not allow extraneous matters to enter into your deliberations. To avoid additional expense to the parties, and to the county, it is, I am sure, the desire of each of the parties that this action be determined by you by a just verdict upon the evidence and in accordance with the law as charged.

The law provides that, in a case such as this, a determination by five-sixths of the jury in favor of one party against the others constitutes a verdict. If, therefore, after a careful review of the evidence, ten or more of you agree in favor of one party and against the others, you may bring your deliberations to an end and inform the officer in charge that you are ready to report a verdict.

140 Members of the jury, take this case and, without sympathy on the one hand and without prejudice on the other, try to do exact justice between the parties.

I want to be sure you have the correct figures. When I stated the number of hours, I should have stated "not more than 1996 hours." And the date of the contract was "1942," rather than "1943," as I am told I said.

Any exceptions or requests?

Mr. Lessler: No exceptions and no requests.

Request to Charge

Mr. Raby: I have one exception, your Honor. I respectfully except to that portion of your Honor's charge which stated that the eight-hour law conferred a cause of action upon the plaintiff for overtime wages. And I respectfully ask your Honor to charge that there is no right of action pursuant to the eight-hour law in plaintiff for overtime.

The Court: I refuse so to charge.

Mr. Raby: I respectfully except, your Honor. That is all.

The Court: The jury may retire.

(The jury retired from the courtroom at 3:16 p. m. for deliberations.)

The Court (at 3:50 p. m.): Counsel, I have received a message from the jury reading as follows: "How many days did plaintiff work in which he claims to have worked overtime. James C. Petrillo, Foreman."

(Colloquy off the record at the Bench.)

The Court: By stipulation of respective counsel, the stenographer is directed to go up to the juryroom and read that
141 part of plaintiff's testimony which gives the number of days he claims to have worked overtime. Do you consent?

Mr. Lessler: I consent.

Mr. Raby: I consent.

(At this point the stenographer went to the juryroom and read the record of plaintiff's testimony pertaining to number of days he claimed to have worked overtime.)

(The jury returned to the courtroom at 4:14 p. m.)

Verdict

The Clerk: Mr. Foreman and ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find?

The Foreman: We, the jury, find for the plaintiff in the amount of 1172 hours overtime at $2.13 per hour, or a total of $2,496.36.

The Clerk: Your verdict is as against both defendants?

The Foreman: That's right.

The Clerk: Is that verdict unanimous?

The Foreman: Yes, it is.

The Clerk: Ladies and gentlemen of the jury, hearken to your verdict as it stands recorded: You say that you find a verdict in favor of the plaintiff in the sum of $2,396.36 against both defendants. And so say you all.

Mr. Lessler: I would like to move for interest. I think it should be figured on a mesne period.

The Court: Have you agreed on that?

Mr. Raby: I cannot agree on anything, your Honor. It is entirely a matter for your Honor's ruling.

142 Mr. Lessler: Well, we have asked for interest in the complaint, and we are entitled to it.

The Court: Well, that is a matter that does not concern the jury, and so we will let the jury go while we talk about interest. I

will discharge the jury with the thanks of the Court. You may go to the Central Jury Part with the officer.

(At this point the jury retired from the courtroom.)

Motion to Set Aside Verdict

Mr. Raby: If your Honor please, I respectfully move that the verdict be set aside on all the grounds stated in Section 549 of the Civil Practice Act, on the ground that it is contrary to law, contrary to the evidence and the weight of the evidence, and on the ground that it is excessive.

Mr. Lessler: Excessive? I don't think we got enough.

The Court: Motion denied.

Mr. Raby: I respectfully except.

Colloquy

Mr. Lessler: On the question of interest, your Honor, I think we should get interest from a mean period, somewhere between May and December. I think that should be somewhere around September, say from September 1st or 15th.

Mr. Raby: On unliquidated damages, your Honor, it is my understanding that interest runs from the time of starting suit.

Mr. Lessler: This is a wage claim—in the nature of a wage claim. There is nothing unliquidated about a wage claim. That is all it is, a wage claim, nothing more, nothing less.

The Court: You are willing to take a mesne period?

143 Mr. Lessler: Yes. We claim the period May to December. Instead of figuring it out each month, I think we should take a mesne period, 6 per cent from the middle of that period, which would be about September 15th. The two periods involved here is from May to December.

The Court: You want a mesne period from the 1st of September?

Mr. Lessler: Yes, we should have 6 per cent from September 1st.

The Court: All right, interest from September 1st, 1942.

Mr. Raby: If your Honor please, for the record, I respectfully except to the computation and allowance of interest granted on the ground that interest should be computed from the date of the commencement of the action.

The Court: Your exception is noted.

Mr. Raby: Now, if your Honor please, on behalf of the defendants, I should like to have a stay of execution of thirty days and sixty days to make a case.

Mr. Lessler: Thirty days' stay is not necessary, your Honor. We have waited a long time for this money. I think a ten days' stay is sufficient. I understand that they are going to appeal.

Mr. Raby: Yes, but authority for so doing must come from the Solicitor General of the United States, in Washington, and that will require thirty days.

Mr. Lessler: Well, I ask your Honor not to give such a long stay. It would be an awfully long stay in a case of this kind, for wages. There is no need for it. It isn't a question that they haven't got the money, or anything like that, and they don't need all that time.

144 Mr. Raby: We are going to appeal in any event, your Honor.

Mr. Lessler: All right, if they are going to appeal, then I think your Honor should allow only a ten days' stay of execution and thirty days to make a case. I don't think there should be any such long stay of thirty days. I object to such a long stay. It should not be more than fifteen or twenty days at the most.

The Court: Well, if counsel has to write to Washington for authority, he would need thirty days, I should think.

Mr. Lessler: Well, I will agree to a twenty days' stay your Honor.

Mr. Raby: All right, I will stipulate to a twenty days' stay.

The Court: Very well, twenty days' stay and sixty days to make a case.

The Clerk: I have computed the interest, your Honor, with counsel for the plaintiff. The interest is $650. from September 1st, 1942, making a total verdict of $3,146.36.

---

145 *Plaintiff's Exhibit 1*

(Front side)

AGREEMENT OF EMPLOYMENT.

AGREEMENT made this 14th day of February, 1942, between FOLEY BROTHERS, INC., and SPENCER, WHITE & PRENTIS, INC., as Joint Contracting parties hereinafter called Constructors, and FRANK PAUL FILARDO hereinafter called Employee:

NOW, THEREFORE, in consideration of the mutual covenants herein contained, it is hereby mutually agreed as follows:

ARTICLE I. This Agreement of Employment is made by the Constructors pursuant to Contract No. DA-W-1098 Eng. 109, dated November 10, 1941, between the United States of America and the Constructors for engineering and construction work in the East, Near East and elsewhere, and is, in all respects, subject to provisions of said Contract and the reasonable requirements and inter-

pretation thereof, and the services of the Employee shall be rendered (except for work in the United States pending his departure) in the East, Near East and other places to which the Constructors may send the Employee, it being intended, however, that the services contracted for will be principally rendered outside of continental United States.

ARTICLE II. The Employee hereby agrees to enter the services of the Constructors and the Constructors agree to employ the Employee as a Cook for which he represents he is duly qualified, at a weekly salary of $60.00 for services outside of continental
United States, payable as hereinafter mentioned, commencing
146 on the date on which the Employee leaves continental United
States.

The Employee recognizes the substantial non-productive expense to which the Constructors will be put in providing, under the conditions of this Agreement, transportation with pay from the port of embarkation until his arrival at the site of the work, and also acknowledges the disruption of organization incident to his replacement. Accordingly, the Employee agrees that he will continue in the employment of the Constructors at the site of the work for as long a period as the Constructors desire his service on the construction not exceeding a maximum of twelve months plus such time as may elapse pending availability of return transportation to the United States, with the understanding, however, that the Constructors may terminate such employment with or without cause at any time.

ARTICLE III. This Agreement is to take effect only if and when the Employee is directed by the Constructors to report for duty. If the Employee is not called into the Constructors' service by being advised to report for duty or to report for transportation out of the United States within a period of four weeks from the date hereof, then this Agreement shall be void and neither party shall have any claim on the other.

ARTICLE IV. If and when the Employee enters the Constructor's service, the Employee agrees to enter therein and to remain therein for the periods herein provided for. Salary is to start when the
Employee leaves continental United States, and continue un-
147 til his return to the point of debarkation in continental
United States except as otherwise provided herein or until the termination of this Agreement (the amount to be payable to the Employee upon his return to be fixed and determined by the Constructors and Employee before the Employee leaves the site of the work, and entered in his record of employment described in ARTICLE

XX hereof); provided, however, that if after entering the Constructors' employ the departure of the Employee from the United States is not effected for any reason, the Employee will work for the Constructors in the United States, pending such departure, at the rate of $30.00 per week for such period as the Constructors may desire.

ARTICLE V. As consideration for the services rendered by the Employee, the Constructors agree to pay said Employee's salary in U. S. Currency, or its equivalent, partly on the site to the Employee and the balance by check on a New York bank.

The Constructors have made arrangements with Central Hanover Bank & Trust Co., N. Y. C. for the opening of an account in the name of the Employee. The Constructors will deposit in such account such part of the Employee's salary as is not paid at the site of the work. The Employee may control such account by documents prepared for that purpose which must be signed by the Employee before leaving the United States. The Employee shall sign the payroll or other proper receipt which in each instance shall evidence receipt in full for all claims to the end of the weekly period. Without specific consent of the Constructors, the payment to the Employee on the site shall not exceed the equivalent of $7.00 per week in U. S. Currency. Subject to the foregoing provisions of this article it is understood and agreed that such part of the Employee's salary which is not payable in New York City and which would normally accrue from the date of his departure from the continental limits of United States until his arrival at the site shall be payable as follows:

148

(a) one-half thereof upon his arrival at the site of the work; and

(b) The other one-half shall not be deemed earned and shall not be due and payable unless and until the Employee shall remain in the employ of the Constructors at the site for a period of eight weeks. During the return trip from the site of the work, the part of the Employee's salary which is not payable in New York City shall be payable upon his arrival in the continental United States.

ARTICLE VI. During the term of such employment, the Employee shall devote all of his time and attention and give his best efforts and skill to the performance of such services in and about such projects as the Constructors may from time to time assign to him.

ARTICLE VII. The Constructors agree to furnish the Employee transportation and meals while enroute in accordance with regula-

tions prescribed by the Army Officer in charge, from New York, N. Y. to the site of the Construction Project, and likewise return transportation, including meals from the Construction Project to New York, N. Y. provided the Employee remains at work as long as desired by the Constructors, or as specified in ARTICLE II hereof.

ARTICLE VIII. While this agreement is in effect, the Constructors shall, at or near the site of the Construction Project, supply food, lodging and medical services as authorized by the Army Officer in Charge at no cost to the Employee.

ARTICLE IX. If the Employee becomes ill or disabled during his employment on the site and if the doctor in charge deems that he is unable to perform his duties, or upon termination of this Agreement by the Constructors (unless terminated for breach thereof by the Employee, or for causes beyond the control of the Constructors as described in this Article), the Employee is to be returned to New York, N. Y. and the Constructors shall pay the return transportation and subsistence thereto, and his salary shall continue until his return to the point of debarkation, provided, however, that if the return of the Employee is prevented by causes beyond the control of the Constructors and not due to the fault of the Employee, the employment of the Employee shall thereupon be deemed terminated, but the Constructors will in lieu and in full of all obligations to the Employee under this Agreement pay to the Employee weekly (or as soon as practicable) an amount equal to the weekly salary provided for herein during the continuance of such prevention period, but such weekly payments shall not exceed $5,000 in the aggregate; provided, however, that if the Employee would as to such prevention period be entitled to benefits under any Workmen's Compensation Law or Employers' Liability Law in excess of said weekly payments, the Constructors will make payments in the amount of such excess.

ARTICLE X. In the event the Employee cannot be employed continuously as a Cook it is mutually agreed that he will perform work of any equivalent or lower rate classification that the Constructors shall assign to him within the limit of his ability, but at the stated salary.

Plaintiff's Exhibit 1

(Reverse side)

ARTICLE XI. The Employee agrees to work in harmony with all other labor or mechanics employed on the project and his failure so to do will be cause for his dismissal.

ARTICLE XII. The Employee agrees to comply with all rules, regulations and requirements of the United States Government and the War Department in connection with the work under this Agreement, and with the rules and regulations required by the constructors.

ARTICLE XIII. The Constructors will pay or provide compensation for the disability or death from injury arising out of and in the course of the employment, in accordance with applicable workmen's compensation laws and such other insurance as may be approved by the U. S. Army, and the Employee will accept such compensation in full satisfaction of all claims or rights under the common, civil, or statuory law of any jurisdiction on account of any such injury or death.

151 ARTICLE XIV. In case of the death of the Employee arising from war risk hazards under circumstances not entitling his dependents to the payments provided for in ARTICLE XIII, the Constructors will pay to the beneficiary designated by the Employee the sum of $5,000 when approved by the Contracting Officer and funds therefor are received by the Constructors from the Government. In case of accident arising from war risk hazards prior to the termination of his employment the Constructors will pay the Employee during the period of disability an amount equal to his weekly salary up to but not exceeding the sum of $5,000. In no event shall the payments under this Article and under ARTICLE IX hereof on account of prevention periods exceed in the aggregate the sum of $5,000.

ARTICLE XV. If the Employee, beneficiary or personal representative shall be entitled to receive any compensation in accordance with ARTICLE XIV above, or any benefits under any applicable Workmen's Compensation or Employers' Liability Law as to any period for which salary or prevention period payments have been made to the Employee under this Agreement, such payments shall be deemed payments on account of or in full, as the case may be, of any such compensation or benefits due.

ARTICLE XVI. The Employee designates Adolphe Filardo, His brother, residing at 1305—17th St., N. W. Washington, D. C. as the beneficiary entitled to the $5,000 death payment provided for in ARTICLE XIV above. In the event of the prior decease of said beneficiary, said payment shall be made to the Employee's executor or administrator.

152 ARTICLE XVII. This Agreement is predicated upon the Employee obtaining draft deferment if he is subject to draft, having no criminal record, being able to secure a passport and to pass a medical examination required by the War Department and/or

the Constructors and to submit to any finger printing, immunization, medical examination on leaving the site of the work and on debarkation in the United States that may be required by the War Department and/or the Constructors, the cost being paid by the Constructors.

ARTICLE XVIII. If the Employee contracts any venereal disease or is incapacitated from carrying on his normal work by reason of intoxication, use of drugs or other act of misconduct or is insubordinate or fails or neglects to properly carry on his work or becomes for any reason obnoxious to the officers of the U. S. Army in charge of the work or to local authorities, this Agreement and the employment of the Employee may be canceled by the Constructors and the Constructors' obligation to the Employee, except to return him to the place of employment, shall thereupon cease and they shall be under no further obligation to him. In the event that the Employee fails or refuses to work, his salary shall cease at the time of each cessation of work by him, excepting that during illness, salary, if and to the extent authorized by the Army Officer in Charge, may be paid. Should the Employee cease work for causes not excusable, including, but not limited to loss of time from venereal disease, the intemperate use of alcoholic beverages, or from the use of narcotic drugs, the salary herein specified shall be reduced in proportion to the time so lost.

153 ARTICLE XIX. Anything herein to the contrary notwithstanding, all obligations of the Constructors to the Employee under or in any manner arising out of this Agreement or the relation of employer and employee resulting therefrom, shall cease and determine in the event of the termination of said Contract No. DA-W-1098 Eng. 109. In such event, this Agreement shall be deemed assigned to the United States and the sole rights of the Employee hereunder shall be to receive further salary, transportation, subsistence and benefits provided for herein from the United States pursuant to ARTICLE VI of said Contract No. DA-W-1098 Eng. 109 which reads in part as follows:

> "The Government shall assume and become liable for all obligations, commitments and claims that the Constructor may have theretofore in good faith undertaken or incurred in connection with said work, the cost of which would be reimbursable in accordance with the provisions of this contract; and the Constructor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government, the rights

and benefits of the Constructor under such obligations or commitments."

ARTICLE XX. Before the Employee returns from the site of the work, the Constructors shall make in duplicate a record of his employment stating the circumstances under which the Employee is returning, upon which the Employee shall set forth the nature, extent, and the amount of all claims of the Employee against the Constructors under or arising out of this Agreement or his employment hereunder. Both copies of this record shall be signed by the Constructors and the Employee and one copy of this record shall be given to the Employee, who shall present same to the Constructors upon his return to the continental United States. No claims of any nature shall be recognized nor shall the Employee be entitled to payment of any compensation, benefits or other sums whatever except upon the presentation of such record of employment and in accordance with the entries therein contained. Should said record of employment be lost or the Employee be unable for any other reason to present the same upon his return, the Constructors shall as promptly as circumstances permit, obtain a duplicate of such record from the Field Office at the site of the work and any claims which the Employee may have will be adjusted promptly upon the receipt of such duplicate, but not otherwise.

154

ARTICLE XXI. It is hereby mutually agreed that there are and have been no promises or representations on the part of the Constructors or the Employee other than those expressly stated above.

IN WITNESS WHEREOF, the parties hereto have signed this AGREEMENT the day and year above written.

FOLEY BROTHERS, INC.,
SPENCER, WHITE & PRENTIS, INC.,
Joint Contracting Parties and
Constructors.

155

EDWIN L. O'NEILL (Signed)
By FRANK PAUL FILARDO (Signed)

Defendants' Exhibit A.

Foley Bros., Inc., & Spencer, White & Prentis, Inc.
Iranian Operations
EMPLOYEE'S CLAIM ... Out of CLASSIFICATION

Name: Bernard T Ehret Badge No: 929 Date: 11/21/42
Present Payroll Classification: Dox. Op. Rate: 2.10
Original Duties: OPERATING TRACTOR
Present Duties: LABOR FOREMAN

Give below, in your own handwriting, a brief statement summarizing the facts of your case. Tell when you assumed your new duties and by whom you were assigned to them. Tell how long a period you were asked to handle the job on a trial basis. Sign this statement and then turn it over to your immediate superior, who will also give a statement as to his knowledge of the facts of the case.

Employee's Statement: I have been working in the capacity as a labor foreman since June 42 when Burt Siemens then camp manager assigned this duty to me, my work has consisted of allocating the native labor to the various jobs. Assigned to me Mr Farthing labor informs me that he has asked for this change in re-classification

Signed: Bernard T. Ehret

Superior's Statement: I have written a recommendation asking for a reclassification of Bernard T, Ehret from Do. Op. to labor foreman . This man has performed the duties of

Name: Bernard Ehret Badge No: 717 Date: 11/21/42
Present Payroll Classification: Dox. Op. Rate: 2.10
Original Duties: OPERATING TRACTOR
Present Duties: LABOR FOREMAN

Give below, in your own handwriting, a brief statement summarizing the facts of your case. Tell when you assumed your new duties and by whom you were assigned to them. Tell how long a period you were asked to handle the job on a trial basis. Sign this statement and then turn it over to your immediate superior, who will also give a statement as to his knowledge of the facts of the case.

Employee's Statement: I have been working in the capacity as a labor foreman since June 42 when Burt Siemens then camp manager assigned this duty to me, my work has consisted of allocating the native labor to the various jobs. Assigned to me Mr Farthing labor informs me that he has asked for this change in re-classification

Signed: Bernard T. Ehret

Superior's Statement: I have written a recommendation asking for a reclassification of Bernard T, Ehret from Do. Op. to labor foreman . This man has performed the duties of labor foreman which capacity he was working in when I was assisgned to Karkheh River Camp. His work has always been satisfactory and he very dependable.

After

Signed: H. M. Farthing

Form 6-3
[illegible] Corp.
[illegible]

Notary Public, New York County
Clerk's No. 665, Register's No. 3-B-1044
Commission Expires March 30, 1943

SEAL

Subscribed and sworn to before me at New York this 14th day of February, 1942.

This form approved as to form and substance and in accord with Contract No. DA-W-1098 Eng. 109 by Contracting Officer U. S. Army.

Plaintiff's Exhibit 2 for Identification

This exhibit is a written rejection of plaintiff's claim, executed by defendants.

Not printed pursuant to stipulation on page 233 of this record.

Plaintiff's Exhibit 3.

NAME FRANK PAUL FILARDO Serial No. F- 1328, 4921

ADDRESS 198 West 14th Street, Chicago Heights, Ill.

PLACE OF ORIGIN NYC DATE [illegible] 8-14-42

CLASSIFICATION Cook - Head Cook [illegible] 60., P., 25.

DATE LEFT BASE 3-12-43 METHOD OF TRANSPORTATION SS PRESIDENT BUCHANAN

REASON FOR RETURN Contract Completion

	Approved by Project Manager	Amount Claimed by Employee
Amount claimed by employee for overseas allotment to date of return to U. S.	NONE	NONE
Amount claimed by employee for New York partial payroll to date of return to U. S.	NONE	NONE
Amount claimed by employee for overtime or other compensation not paid at base.	NONE	SEE REMARKS
Amount claimed for traveling expense.	NONE	NONE
Amount of baggage claim.	-	$25.00
Amount of any other claims.	NONE	NONE

REMARKS BY PROJECT MANAGER No overtime due on weekly contract.

REMARKS BY EMPLOYEE: Claim overtime and classification as head cook from 3-1-42.

PLACE OF ORIGIN NYC 8-14-42

CLASSIFICATION Cook - Head Cook 60., P., 25.

DATE LEFT BASE 3-12-43 METHOD OF TRANSPORTATION SS PRESIDENT BUCHANAN

REASON FOR RETURN Contract Completion

	Approved by Project Manager	Amount Claimed by Employee
Amount claimed by employee for overseas allotment to date of return to U. S.	NONE	NONE
Amount claimed by employee for New York partial payroll to date of return to U. S.	NONE	NONE
Amount claimed by employee for overtime or other compensation not paid at base.	NONE	SEE REMARKS
Amount claimed for traveling expense.	NONE	NONE
Amount of baggage claim.	-	$25.00
Amount of any other claims.	NONE	NONE

REMARKS BY PROJECT MANAGER No overtime due on weekly contract.

REMARKS BY EMPLOYEE: Claim overtime and classification as head cook from 3-1-42.

Prepared by:

Eugene N. Kozyckowski
Chief Accountant

Date June 10, 1943

Arrived in U.S. [illegible]

We certify that there are no other claims of the employee against the contractor.

[illegible]
Project Manager

Frank P. Filardo
Employee

SUPREME COURT
FILED
JUL 3
SUPREME COURT, U.S.

192
192

Plaintiff's Exhibit 4.

EMPLOYMENT RECORD

Name Frank Paul Filardo Serial No. 4501 Case No. 579

Home Address 260 Riverside, New York City.

Place of Employment New York, N.Y. Date 2.14.42

Classification Head Cook Rate of Pay $ 95.00 per ~~Hour~~ Week ~~Month~~

Date of Embarkation from U.S. 2.16.42 Date of Arrival Overseas 3.31.42

Date of Leaving Overseas _____ Date of Return to U. S. _____

Reason for Return to U.S. Expiration of original Contract.

	Approved by District Engineer	Disapproved by District Engineer
Amount claimed by Employee for Salary to date of departure for U. S.	$ None	$
Amount claimed by Employee for overtime or other extra compensation prior to date of departure for U.S.	$ None	$
Any other claim of Employee	$ None	$

Remarks by District Engineer: _____

Remarks by Employee: Claim for overtime put in and disapproved. Have filed claim for baggage lost.

Classification Head Cook Rate of Pay $ 95.00 per ~~Hour~~ Week ~~Month~~

Date of Embarkation from U.S. 2.16.42 Date of Arrival Overseas 3.31.42

Date of Leaving Overseas _____ Date of Return to U. S. _____

Reason for Return to U.S. Expiration of original Contract.

	Approved by District Engineer	Disapproved by District Engineer
Amount claimed by Employee for Salary to date of departure for U. S.	$ None	$
Amount claimed by Employee for overtime or other extra compensation prior to date of departure for U.S.	$ None	$
Any other claim of Employee	$ None	$

Remarks by District Engineer: _____

Remarks by Employee: Claim for overtime put in and disapproved. Have filed claim for baggage lost.

SUPREME COURT
PLAINTIFF'S EX. 4
DEFENDANT'S
DATE _____
SOL RIEGER
Stenographer

Walter W. Santelmann
Walter W. Santelmann,
Captain, Corps of Engineers
Executive Officer.

Frank P. Filardo
Employee

Dated: _____

This is to certify that the above approved claim has been found to be true and correct and that same has been paid in full for all services rendered under the terms of the employment contract up to and including _____ as set forth above.

_____
Name

_____
Title

March 1945

-193-

SUPREME COURT
EXHIBIT'S
D
DEFENDANTS
SOL RIGGER

Defendants' Exhibit D.

EXTENSION AGREEMENT

In consideration of one dollar and other valuable considerations passing between the parties, it is agreed between the undersigned employer and employee that the term of employment set forth in the agreement of employment between the parties is hereby extended to September 30 1943, and that such employment while in effect shall be (except as to term) under all the terms and conditions set forth in said agreement of employment.

FOLEY BROTHERS, INC. AND
SPENCER, WHITE & PRENTIS, INC.
Constructors - EMPLOYER

BY: Chas. H. Sells
CHAS. H. SELLS
FOREIGN MANAGER

Frank P. Filardo
EMPLOYEE

EXTENSION AGREEMENT

In consideration of one dollar and other valuable considerations passing between the parties, it is agreed between the undersigned employer and employee that the term of employment set forth in the agreement of employment between the parties is hereby extended to September 30 1943, and that such employment while in effect shall be (except as to term) under all the terms and conditions set forth in said agreement of employment.

FOLEY BROTHERS, INC. AND
SPENCER, WHITE & PRENTIS, INC.
Constructors - EMPLOYER

BY: Chas. H. Sells
CHAS. H. SELLS
FOREIGN MANAGER

Frank P. Filardo
EMPLOYEE

Dated: Oct 21-42

E B. Simmons
WITNESS

1328 FILARDO F. P.
Cook 70 00

160 *Plaintiff's Exhibit 5*

FOLEY BROTHERS, INC.
SPENCER, WHITE & PRENTIS, INC.

CONSTRUCTORS

WAR DEPARTMENT CONTRACT DA-W-1098-ENG.-109
IRANIAN OPERATIONS

HEADQUARTERS, BASRA, IRAQ
Ahwaz, Iran Nov. 10, 1942

To whom it may concern:

This is to certify that Mr. Bernard T. Ehret worked for me as my assistant in the Karkheh River camp of the above contractors in Iran.

He is one of the most willing workers I have ever had, very conscientious about his duties and no task was ever too much for him. His personality was good and he got along fine with all of his fellow workers. He is honest beyond question and of a very high grade character. Also he is not one to complain of discomforts and hardships as are found in such an isolated camp as we founded at Karkheh River.

Whenever I assigned a task to Ehret I knew I could devote myself to something else because I was sure that he would stick with and accomplish anything requested of him; and in my absence when a decision was needed from him his judgment without exception was infallible.

It is with no reservations whatsoever but with a decided pleasure that I can hereby recommend Ehret for any kind of a construction job where he may be under consideration.

Sincerely.

BURT SIMMONS
Burt Simmons, Sup't.

161 *Plaintiff's Exhibit 6*

Supreme Court of New York

County of New York

Stipulation

FRANK PAUL FILARDO, *Plaintiff*,

—against—

FOLEY BROTHERS INC., and SPENCER WHITE & PRENTIS INC., *Defendants.*

IT IS ADMITTED AND CONCEDED by the attorney for the above-named defendants that on November 10, 1941, the defendants entered into a written contract with United States of America involving overseas construction, said contract being the one referred to in plaintiff's amended complaint in Paragraph 2 and Paragraph 7 thereof. It is further admitted and conceded by the attorney for the above-named defendants that said agreement provided in part as follows:

"ARTICLE V.—SPECIAL REQUIREMENTS

(1)(b) Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, all political subdivisions thereof, or any other duly constituted public authority wherein the work is done."

162 "ARTICLE IX.—LABOR

(6)(b) The Constructor shall comply with all applicable requirements of the said regulations of the Secretary of Labor under the Act of June 13, 1934, and the requirements of this article of the contract shall be subject to all applicable provisions of such regulations.

(c) "The Constructor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure fulfillment of the requirements of this article.

(d) "The provisions of this Paragraph 6 shall not be applicable to work performed at the site of the work under contract."

IT IS STIPULATED AND AGREED by and between the attorneys for the respective parties to this action that the foregoing provisions of the said contract be admitted in evidence at the trial of this action, in lieu of admission of the entire contract.

Dated: New York, N. Y., November 18, 1946.

CHESTER A. LESSLER,
Attorney for the Plaintiff.

JOHN F. X. MCGOHEY,
Attorney for the Defendants.

164 *Defendants' Exhibit B for Identification.*

This is a letter from the War Department to the defendants, dated December 19, 1941.

Not printed pursuant to stipulation on page of this record.

Defendants' Exhibit C for Identification

This is a letter from the War Department to the defendants, dated January 17, 1942.

Not printed pursuant to stipulation on page of this record.

166 *Defendants' Exhibit E*

Supreme Court of the State of New York
County of New York

FRANK PAUL FILARDO, *Plaintiff*,
—*against*—
FOLEY BRO., INC., and SPENCER WHITE & PRENTIS, INC.,
Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the respective attorneys hereto that the examination be taken before a Notary Public with the same force as if it were taken before a Justice herein.

IT IS FURTHER STIPULATED AND AGREED that upon service of a copy of the examination upon the attorney for the defendants that the filing of the same be waived.

Dated, New York, February 27, 1945.

S/ CHESTER A. LESSLER,
Attorney for Plaintiff.

S/ JOHN F. X. McGOHEY, U. S. Att.,
Attorney for Defendants.

---

167 Supreme Court of the State of New York

County of New York

FRANK PAUL FILARDO, *Plaintiff*,
—*against*—
FOLEY BRO., INC., and SPENCER WHITE & PRENTIS, INC.,
Defendants.

Appearances:

EUGENE KORTJOHN,
On behalf of the defendants.

JOHN F. X. McGOHEY,
By Mr. Townsend, attorney for defendants.

CHESTER A. LESSLER,
Attorney for Plaintiff.

Eugene Kortjohn, being duly sworn, appears for his examination at the office of Chester A. Lessler, 551 Fifth Avenue, at 2:30 P. M., February 5th 1945, and answers the questions as follows:

Q. What is your name? A. Eugene Kortjohn.

Q. Where do you live? A. Pelham, N. Y.

Q. Are you an officer of the defendant corporation? A. I am, office manager.

Q. Of which company? A. Of Foley Bros., Inc. and Spencer White & Prentis, Inc.

168 Q. Where is the office of that company? A. On East 40th Street.

Q. Are you familiar with the subject matter of the examination before trial? A. I am.

Q. Did you hire the plaintiff or rather did your company hire plaintiff, Frank Paul Filardo? A. That's right.

Q. Will you give me the details of the contract? A. He was hired on the 14th day of February, 1942 as a cook at a salary of $60.00 per week. He did duties pursuant to the employment contract, dated February 14th, 1942.

Q. Have you that written contract? A. I have.

The plaintiff offers contract in evidence as Plaintiff's Exhibit I.

Q. Did he proceed to work under this contract? A. He started on February 16th, 1942.

Q. And where did he proceed to work, where did he go? A. He went to Iraq and Iran.

Q. And when did he commence to work as a cook? A. The 31st day of March, 1942, or the following day.

Q. Where was that at? A. That would have been in Iraq.

Q. That was the name of the camp? A. I don't know.

Q. Have you any records before you that would tell you just what camps he worked at? A. I don't believe so.

Q. Can you tell me when he worked at the camp known as Raffidayah at Iraq? A. That would have been upon his arrival at the base, April 1st. I don't know for certain.

Q. What were his duties at the camp at Iraq? A. Cook.

169 Q. At that camp, had there been a base established? A. Yes.

Q. And did he supervise the cooking for the camp? A. I don't know.

Q. Do you know whether he had any cooks under him? A. I don't know that from my own knowledge.

Q. Did you also have a grade known as "head cooks"? A. Not at that time.

Q. When did you first begin to have head cooks? A. I will have to go back to my records. My recollection of it was that it was in October or November, 1942.

Q. And what were the duties of the head cooks at that time, disguishing them from other cooks? A. Supervision of native cooks and other American cooks.

Q. Did he work steadily according to your records? A. No.

Q. From when to when did he work? A. He worked from April 1st to April 4th, April 6th and 7th, from April 9th to April 11th; he was sick from April 12th to April 17th; he worked on the 19th; he was sick from April 20th through May 3rd; he worked from May 4th through May 28th, except on Sundays. He was sick from May 29th through May 31st. He worked June 1st, 2nd, 3rd and 4th; he was sick the 5th, 6th, 7th and 8th. He worked from June 9th through June 29th, except on Sundays. He was absent without leave on June 30th, July 1st, 2nd and 3rd. He was sick on the 4th of July. He did not work on July 5th. He was sick July 6th, 7th, 8th and 3½ hours on the 9th. He worked 4½ hours on the 9th and continued working through the 26th, except on Sundays. He was absent without leave July 27th, 28th, 29th, 30th and 31st,
170 the 1st, 2nd, 3rd and 4th of August. He worked on the 5th, 6th, 7th and 8th of August. He worked from then until the 2nd of September, except on three Sundays. He was sick on the 3rd, 4th, 5th and 7th of September; he worked on the 8th, 9th, 10th, 11th and 12th of September. He worked the 14th, 15th, 16th, 17th, 18th and 19th of September, the 21st, 22nd, 23rd, 24th, 25th and 26th of September, the 28th, 29th, 30th of September, 1st, 2nd and 3rd of October; 5th, 6th, 7th, 8th, 9th and 10th of October; 12th, 13th, 14th, 15th, 16th and 17th of October. He was absent with leave on the 19th of October. Worked on the 20th, 21st, 22nd, 23rd, 24th and 25th of October. He worked on the 26th of October. He was absent without leave from the 27th of October through the 1st of November, 1942. He was suspended from work that period that I last mentioned.

Q. What dates? A. From the 27th of October through the 1st of November.

Q. For what reason was he suspended? A. I can't see it here.

Q. You have no indication of the reason why he was suspended on the record? A. Not that I can see off hand.

Q. Continue with the dates. A. Worked 2nd, 3rd, 4th, 5th, 6th and 7th of November. The 9th, 10th, 11th, 12th, 13th and 14th of November, 16th and 17th. He was sick the 18th, 19th, 20th, 21st, 23rd, 24th, 25th, 26th and 27th. He worked on the 28th. He worked on the 30th of November, December 1st, 2nd, 3rd, 4th, 5th; 7th, 8th, 9th, 10th, 11th and 12th of December; the 14th, 15th, 16th, 17th, 18th and 19th. Then was suspended for a period from the 21st of December until December 31st.

171 Q. What is that suspension for? A. Violation of Article 18 of the Employment Contract.

Q. Says what? A. Employee who contracts any venereal disease or something to that effect—

Q. Does he lose pay? A. Yes.

Q. And you have no indication for what reason he was suspended? A. I can locate those reasons, I am sure.

Q. During the period he was sick, did you pay him? A. We paid him when he was sick, ordinary causes.

Q. Was he so paid during that period? A. Yes.

Q. Go ahead. A. He worked on the 1st and 2nd of January. He worked the 4th through 9th of January. Worked 11th, 12th, 13th, 15th, 16th and 17th of January. He worked the 18th, 19th, 20th, 22nd, 23rd and 24th of January. He worked the 25th, 26th, 27th, 28th, 30th and 31st of January. He worked February 1st, 2nd, 3rd, 4th and 5th and was suspended from that time until the 8th of March when he started working. He worked the 8th, 9th, 10th, 11th, 12th and 13th. After that he left for the United States on the 13th and was paid on the way back.

Q. Did you read from his card? A. Overseas card.

Q. May I see it? A. Yes.

(Plaintiff offers timeroll card in evidence, 3 sheets, Plaintiff's Exhibit II.)

Q. When did he arrive in the United States? A. He returned to the United States the 9th of June, 1943.

172 Q. How many hours did he work per week? A. The first week I have four days or 32 hours was the time he worked, that was the week of April 5th, 1942. The week ending April 12th, he worked 40 hours, was sick 8 hours or a total of 48 hours. Week of April 19th, worked 8 hours, was sick 40 hours, total 48 hours. Week of April 26th, he was sick 48 hours.

Q. Will you also give the rate of pay? A. Alright. The rate of pay was $60.00 a week and he was paid that.

Q. Go ahead. A. Week ending May 3rd, was sick full week or 48 hours and was paid $60.00. Week ended May 10th, worked 48 hours, was paid $60.00. Week ended May 17th, he worked 48 hours, paid $60.00. Week ended May 24th, worked 48 hours, was paid $60. Week ended May 31st, worked 32 hours, was sick two days, total 48 hours. Was paid $60.00. Week ended June 7th, he worked 32 hours sick two days, paid $60.00. Week ended June 14th, worked 40 hours, was sick full day of 8 hours, was paid $60.00. Week ended June 21st, worked 48 hours, paid $60.00. Week ended June 28th, worked 48 hours, paid $60.00. Week ended July 5th, worked 8 hours, sick 8 hours. He was suspended four days of that week and was paid $20.00. Week ended July 12th, he worked 20½ hours, sick 27½ hours, paid $60.00. Weeks ended July 19th and 26, worked 48 hours, was paid $60.00. Week ended August 2nd, he

didn't work at all and was not paid. He was suspended during that period. Week ended August 9th, he was suspended two days, worked 32 hours, was paid $46.67 at the rate of $70.00 per week. Week ended August 16th, worked 48 hours, paid $70.00. Week ended August 23rd, worked 48 hours, was paid $70.00. Week ended September 6, worked 24 hours, was sick 24 hours, was paid $70.00. Week ended September 13, sick 8 hours, worked 40 hours, paid $70.00. Week ended September 20, worked 48 hours, was paid $70.00. Week ended September 27, worked 48 hours, was paid $70.00. Week ended October 4, worked 48 hours, was paid $70.00. Week ended October 11 worked 48 hours, was paid $70.00. Week ended October 18, worked 48 hours, paid $70.00. Week ended October 25, worked 48 hours, paid $70.00. Week ended November 1, worked 8 hours and was paid $11.67. He was suspended, that was the period spoken about before. Week ended November 8, he worked 48 hours, was paid $70.00. Week ended November 15, he worked 48 hours, paid $70.00. Week ended November 22, worked 16 hours, and was sick 32 hours, was paid $70.00. Week ended November 29, worked 8 hours, sick 40 hours, paid $70. Week ended December 6, worked 48 hours, paid $70.00. Week ended December 13, worked 48 hours, paid $70.00. Week ended December 20, worked 48 hours, paid $70.00. Did not worked week ended December 27, was paid nothing. He was suspended during the period from December 21 to December 31. Week ended January 3, worked 16 hours, was paid $23.33.

Q. Rate $70.00? A. Rate the same.

Week ended January 10, he worked 48 hours, was paid $95.00. Week ended January 17, worked 48 hours, paid $95.00. Week ended January 24, worked 48 hours, was paid $95.00. Week ended January 31, worked 48 hours was paid $95.00. Week ended February 7, worked 40 hours, was paid $79.17. He was sus-
174 pended the one day. From February 6 to March 7, received no pay for that period. He worked 48 hours week ended March 14 and was paid $60.00.

Q. Is that a new rate of payment? A. That is a rate on the contract. Thereafter he was paid at the rate of $60.00 a week during his return trip.

Q. What was the work he did when he received $70.00? A. I don't know how it differed although there were more at the base when he received $70.00 than $60.00.

Q. And when he received $95.00, what was the reason for that? A. That's just a guess.

Q. Would you say when he got $95.00 that he was doing any work different than when he received $70.00? A. I don't know.

Q. Are there any records to show basis for the change? A. Yes, increase from $60.00 to $70.00 states he had assumed responsibility requiring increase.

Q. And the other increase? A. All I can see is agreement with the District Engineer and Mr. Sells. Reduction to $60.00 was because of his suspension.

Q. Increase of $95.00 was caused by what? A. Merely a general understanding that the project manager had with the District Engineer that the cooks deserved increases.

Q. What was the name of the one who recommended that? A. Mr. Sells.

Q. Who was what? A. Project manager.

Q. Who is this District Engineer? Someone else? A. Army officer in charge of the job. I don't recall who was the District Engineer at that particular time.

175 Q. You say that in October, you had such a thing as head cook? A. That's my recollection.

Q. What was the minimum rate of pay the head cook got? A. We had no minimum rates of pay. My recollection is that most of them got from $75.00 to $95.00.

Q. You said that you have no record showing just what camps he worked at? A. I saw one place in here where he worked at Korkehah River.

Q. For what period of time did he work at Korkehah River? A. No, I can't tell you.

Q. And you have no records to show that? A. I have none here.

Q. Would you have any anywhere else? I am anxious to know the different camps. A. I do not know how to locate them myself.

Q. Do you know if he also worked at Ahwaz, Iran? A. No, I don't know. That was the main headquarters.

Q. Can you tell me who was the camp manager of these three camps: Raffidayah during April and Ahwaz in May of 1942 and Korhehah River around June, 1942? A. I April, Mr. Sells was in charge. May Mr. Sells. He was under the direct supervision of Thomas Brady at Korkehah River. Who was camp manager I don't know.

Q. In whose handwriting were the records in? A. I don't know.

Q. Somebody from the company? A. From the company, yes.

Q. Were any of those records signed by the plaintiff that you know of? A. His weekly payroll was signed every week. That was turned over to the government.

176 Q. Did that show the time? A. Showed the number of hours, yes.

Q. That he worked? A. Yes.

Q. During that period of time, did he complain or put in a complaint for overtime pay? A. Yes, he put in a complaint for overtime pay when he terminated his work at the base and when he got back to New York.

Q. Was it in the form of writing? A. Yes.

Q. Have you that claim? A. I have both of those claims here or copies of it.

(Plaintiff offers in evidence the claim for overtime pay produced by witness filed at the base approximately in March, 1943—marked plaintiff's Exhibit III.)

Q. I note that on that record, claim is put in and disapproved. Do you know on what basis it was disapproved? A. He was paid in accordance with the contract.

Q. Was it disapproved on the ground that he did not work overtime or that he was not to get extra pay for overtime? A. He was not to get extra pay for overtime, and he did not work overtime.

Q. Do you know whether he actually did work more than the 48 hours a week as set forth in your weekly time sheet? A. I don't know.

Q. Would you say then that he might have? A. There is a possibility that he might have worked over 48 hours some weeks. He was subject to call in any of the 168 hours of the week.

177 Q. Then the weekly time sheet is merely just a matter of form rather than the actual hours he might have worked? A. That's true.

Q. You say he put in a separate claim for overtime upon arrival in this country? A. That's right.

(Plaintiff offers in evidence overtime claim filed approximately June 9, 1943 for overtime pay and for classification as head cook for May 4, 1942—Marked Plaintiff's Exhibit IV.)

Q. With respect to this claim, what was the decision? A. It is shown right on the claim. So states on the claim "no overtime due on weekly contract."

Q. With respect to a claim for additional money on the basis of his classification as head cook, what decision on that? A. He was not entitled to classification as head cook.

Q. The contract that you had with the United States Government was for the building of certain public works in the East and near East, is that so? A. Yes.

Q. You had a written contract with the government for that building project? A. Yes.

Q. May I see the written contract? A. Yes.

(Witness produces contract No. DAW-1098-Eng-109 Contract between Foley Bros., Inc. and Spencer, White & Prentis, Inc. jointly with the United States of America, dated November 10, 1941—Plaintiff's Exhibit V.)

178 Q. You never paid him any overtime, did you? A. No.

Q. Do you know whether there was any oral demand for

overtime prior to the written demand you testified to? A. No, I don't know.

Q. Do you personally know Frank Paul Filardo? A. I don't remember him, I don't believe.

Q. Have you got the receipts of payments of money paid to him? A. Turned over to government.

Q. You haven't them in your possession? A. No.

Sworn to before me this
19th day of March, 1945.

JOHN L. BAUER (signed)

(signed) EUGENE W. KORTJOHN

JOHN L. BAUER,
Notary Public, Queens County
Queens County Clerk's No. 3613
Certificate filed in
New York County Clerk's No. 1278
Commission Expires March 30, 1946.
(Notary Seal)

Defendants' Exhibit F—Page 1.

TIME ROLL CARD.

Serial No. 4501

Name Frank P. Filardo.

Classification ~~Head Cook.~~ Cook

Rate ~~$95.00~~ 60.00 Base Allotment $7.00

Location

Foley Brothers, Inc. and Spencer, White & Prentis Inc.

—Contract—DA—W—1098—eng.—109—

Week Ending	AN'L LV.	P/R No.	194	Number of Hours Worked M	T	W	T	F	S	S	Total Hours	RATE	Amount Due Dollars		Earnings. N.Y.	Base	O.T.	Total
			R.T.															
			S.T.															
			O.T.															
			R.T.															
			S.T.															
			O.T.															
			R.T.															
			S.T.															
			O T															
			R.T.															
			S.T.															
			O.T.															
			R.T.															
			ST															
			O T															
			R T															
			S T															
			O T															
			R T															
			S T															
			O T															
			R T															
			S T															
			O T															
			R T															
			S T															
			O T															
			R T															
			S T															
			O T															

SUPREME COURT
COUNTY OF
DEPOSITION
DATE SOL. STENOGRAPHER

115

Defendants' Exhibit F—Page 2.

TIME ROLL CARD.

Serial No. 450 1328

Name Frank P. Filardo

Classification Asst Cook Cook

Rate $70.00 75.00 Base Allotment $7.00

Location

Foley Brothers, Inc. and Spencer, White & Prentis Inc.

—Contract—DA—W—1098—eng.—109—

Week Ending	AN'L LV.	P/R No.	194	Number of Hours Worked M	T	W	T	F	S	S	Total Hours	RATE	Amount Due Dollars		Earnings. N.Y.	Base	O.T.	Total
			R.T.															
		45	S.T.															
			O.T.															
DEC 11			R.T.															
		1	S.T.	X	X	X	X	X	X									
			O.T.															
		26	R.T.															
			S.T.															
			O.T.															
OCT 25		3	R.T.								48		700					
			S.T.															
			O.T.															
	1/17	28 49	R.T.	8	8	8	X	8	8	8	48		700					
			S.T.															
			O.T.															
	1/24		R.T.	8	8	8	X	8	8	8	48		700					
		50	S.T.															
			O.T.															
	1/31	48 51	R.T.	8				X										
			S.T.															
			O.T.															
		54	R.T.	8	8	8	8	8	X	X			584					
			S.T.															
			O.T.															
			R.T.	X	X					X	X							
		52	S.T.															
			O.T.															
			R.T.	X							X							
			S.T.															
			O.T.															
		4	R.T.															
			S.T.															
			O.T.															

TIME ROLL CARD.

Serial No. 1828

Name Frank P. Filardo

Classification Cook

Rate $70.00 Base Allotment $7.00

Location

Foley Brothers, Inc. and Spencer, White & Prentis Inc.

—Contract—DA—W—1098—eng.—109—

Week Ending	AN'L LV.	P/R No.	194	Number of Hours Worked M	T	W	T	F	S	S	Total Hours	RATE	Amount Due Dollars	Earnings N.Y	Base	T. O.	Total
10/4		34	R. T.	8	8	8	8	8	8	X	48		7 00		70 00		
			S. T.														
			O. T.														
10/11		35	R. T.	8	8	8	8	8	X	X	48		7 00				
			S. T.														
			O. T.														
10/18		36	R. T.	8	8	8	8	8	8	X	48		7 00				
			S. T.														
			O. T.														
10/25		37	R. T.	X	8	8	8	8	8	8	48		7 00				
			S. T.														
			O. T.														
11/1		38	H. T.	8	X	X	X	X	X	X	8		1 14				
			S. T.														
			O. T.														
11/8		39	R. T.	8	8	8	8	8	8	X	48		7 00				
			S. T.														
			O. T.														
11/15		40	R. T.	8	8	8	8	8	8	X	48		7 00				
			S. T.														
			O. T.														
11/22		41	R. T.	8	8		8	8	8	X	16 32		7 00				
			S. T.														
			O. T.														
11/29		42	R. T.						8	X	8						
			S. T.	8	5	5	8	8			40		7 00				
			O. T.														
12/6		43	R. T.	5	5	5	5	5	8	X	35		7 -				
			S. T.														
			O. T.														
			R. T.								17		7 -				
11		44	S. T.														
			O. T.														

117

Defendants' Exhibit F—Page 4.

TIME ROLL CARD.

Serial No. 1328 Name Frank P. Filardo

Classification Cook Rate ~~$60.00~~ 70.00 Base Allotment $7.00

Location

Foley Brothers, Inc. and Spencer, White & Prentis Inc.

—Contract—DA—W—1098—eng.—109—

Week Ending	AN'L LV.	P/R No.	194	Number of Hours Worked M	T	W	T	F	S	S	Total Hours	RATE	Amount Due Dollars	Earnings N.Y	Base	T. O.	Total
JUL 19		22	R.T.	8	8	8	8	8	8	X	48			4	60.00		
			S.T.														
			O.T.														
JUL 26		24	R.T.	8	8	8	8	8	8	X	48			8	60.00		
			S.T.														
			O.T.														
AUG - 2		25	R.T.	X	X	X	X	X	X	X	X		X	9			
			S.T.														
			O.T.														
AUG - 9		26	R.T.	X	X	8	8	8	8	X	32	700	467	10R	46.67		
			S.T.														
			O.T.														
AUG 16		27	R.T.										700	11	70.00		
			S.T.														
			O.T.														
AUG 23		28	R.T.	8	8	8	8	8	8	8	48 8X		700	12	70.00		
			S.T.														
			O.T.														
AUG 30		29	R.T.	8	8	8	8	8	8	X	48		700	13	70.00		
			S.T.														
			O.T.														
SEP - 6		30	R.T.	8	8	8					24		700	14	70.00		
			S.T.				8	8	8	X	24						
			O.T.														
SEP 13		31	R.T.		8	8	8	8	8	8X	40 8X		700	15	70.00		
			S.T.	8													
			O.T.														
SEP 20		32	R.T.	8	8	8	8	8	8	X	48		700	16	70.00		
			S.T.														
			O.T.														
SEP 27		33	R.T.	8	8	8	8	8	8	X	48		700	17	70.00		
			S.T.														
			O.T.														

118

Defendants' Exhibit F—Page 5.

TIME ROLL CARD.

Serial No. 1328

Name Frank P. Filardo

Classification Cook

Rate $60.00

Base Allotment $7.00

Location

Foley Brothers, Inc. and Spencer, White & Prentis Inc.

— Contract—DA—W—1098—eng.—109 —

Week Ending	AN'L LV.	P/R No.	191	Number of Hours Worked M	T	W	T	F	S	S	Total Hours	RATE	Amount Due Dollars	I.D.	Accumulated Totals Base	O.T.	Tou
MAY		13	R.T.	8	8	8	8	8	8	x	48		7 —				
			S.T.														
			O.T.														7
MAY 10		—	R.T.	8	8	8	8	8	8	x	48						
			S.T.														
			O.T.														7
MAY 17		14	R.T.	8	8	8	8	8	8	x	48		7 —				
			S.T.														
			O.T.														7
MAY 24		15	R.T.	8	8	8	8	8	8	x	48		7 —				
			S.T.														
			O.T.														7
MAY 31		16	R.T.	8	8	8	8	8	8	x	32 16		7 03				
			S.T.														
			O.T.														7
JUN 7		17	R.T.	8	8	8	8	8	6	X	32 16		7 —	1	60.00		
			S.T.														
			O.T.														7
JUN 14		18	R.T.		8	8	8	8	8	x	40 8		7 —	2	60.00		
			S.T.	8													
			O.T.														7
JUN 21		19	R.T.	8	8	8	8	8	8	x	48		7 —	3	60.00		
			S.T.														
			O.T.														7
JUN 28		20	R.T.	8	8	8	8	8	8	X	48		7 00	4	60.00		
			S.T.														
			O.T.														7
JUL 5		21	R.T	8	X	X	X	X	8	X	8 8		7 00	5	60-		
			S.T.													—	1
			O.T.														
JUL 12		22	R.T.	8	8	8	4½ 3½	8	2	x	20½ 27½		7 00	6	60-		
			S.T.													—	7
			O.T.														

TIME ROLL CARD.

Serial No. Name

Classification Rate Base Allotment

Location

Foley Brothers, Inc. and Spencer, White & Prentis Inc.

— Contract—DA—W.—1098—eng.—109 —

Week Ending	AN'L LV.	P/R No.	194	Number of Hours Worked M	T	W	T	F	S	S	Total Hours	RATE	Amount Due Dollars	I.D.	Accumulated Totals Base	O.T.	Total
			R.T.														
			S.T.														
			O.T.														
			R.T.														
			S.T.														
			O.T.														
			R.T.														
			S.T.														
			O.T.														
			R.T.														
			S.T.														
			O.T.														
			R.T.														
			S.T.														
			O.T.														
			R.T.														
			S.T.														
			O.T.														
2/14/42	5/4/42	1	R.T.	1st ½ Base Allot. Enroute							31½	7 -	22 12		22 12		
			S.T.														
3/13/42	9/1/42	9	O.T.	2nd ½ Base Allot. Enroute							31½	7 -	22 16		22 16		44 32
APR 5		8	R.T.	X	X	X	X				32	7 -	7				1
			S.T.														
			O.T.														
APR 12		9	R.T.	8	8	-	8	8	-	8	40		7 -		7		
			S.T.														
			O.T.														
APR 19		10	R.T.														
			S.T.	8	8	8	X	X	X	8	40		7		7		
			O.T.														
APR 26		11	R.T.														
			S.T.	8	8	X	X	8	8	X	48	7 -	7 -		7 -		
			O.T.														

SOC. SEC. NO. | CONTRACT RATE 60. wk. | REG. N. Y. 53. | REG. BASE 7. | REG. TOTAL 60.

PLACE OF ORIGIN | EFFECTIVE SAILING DATE | DATE ARRIVED AT BASE

WEEK ENDING	PAYROLL RECORD M	T	W	T	F	S	S	REG. SALARY EARNED	PAID AT BASE	PAID IN N. Y.	UNDER PAYMENT	HOURS O'TIME	AMT. PAID	TOTAL AMT. EARNED	NOTES
7-5		A	A	A	A	S			7 -	53 -					See letter 7/12 = 49
12	S	S	S	S3½					7 -	53 00					8/12 = 100
19									7 -	53 00					
26									7 -	53 00					
8-2	A	A	A	A	A	A				53 -					
9	A	A						40 -	47 [illegible]	23 83		1½	5.19		
16								60 -	7 -	53 -					8/12 2-45 1.52 -
23								60 -	7 -	53 00					1. Suspend 11 VI 44 to 50
30								[illegible]	7 -	53					
9-6				S	S	S		60 -	7 -	53 -					
13	S							70 -	7 -	53					
20								[illegible]	7 -	43 -	[illegible]				$10.00 deducted
27								[illegible]	7 -	53					P/R #875 for
10-4								[illegible]	7 -	53	10 -				em authorized
11	INCREASE							[illegible]	7 -	23	5 -				absence 7/3/44
18								7 -	7 -	53					
25									7 -	[illegible]					
	SU	SU	SU	SU	SU			11 67	1 17						
								70 -	7 -	63 -					
								70 -	7 -	63					
				S	S			70 -	7 -	63 -					
	S	S		S	S			70 -	7 -	60	60				
								70 -	7 -	63					
								70 -	7 -	53 -					
								70 -	7 -	63 -					
	SU	SU	SU	SU	SU	SU				63 -	63 -				
										70	7 -				
TOTAL								611	792 14	2311 13	7 -				

SERIAL NO. F 1328 | NAME FILARDO, FRANK PAUL | OCCUPATION COOK

121

SOC. SEC. NO. 025-03-0133 CONTRACT RATE $60.00 Mr. REG. N. Y. $53.00 REG. BASE $7.00 REG. TOTAL $60.00

PLACE OF ORIGIN EFFECTIVE SAILING DATE 2/16/42 DATE ARRIVED AT BASE 4/13

WEEK ENDING	PAYROLL RECORD M	T	W	T	F	S	S	REG. SALARY EARNED	PAID AT BASE	PAID IN N. Y.	UNDER PAYMENT	HOURS O'TIME	AMT. PAID	TOTAL AMT. EARNED	NOTES
2/21															
28															
3/7															
14															
21															
28															
4/4															
11															
18	S	S	X	S	S	S	S		17						
25	S	S	S	S	S	S	S		16						
5/2	S	S	S	S	S	S	S		67						
9															
16															
23															
30															
6/6															
13															
20															
TOTAL															

SERIAL NO. R 1328 | NAME FILARDO, FRANK PAUL | OCCUPATION COOK

SOC. SEC. No. 025-03-0133 CONTRACT RATE 70. REG. N. Y. 65. REG. BASE 7. REG. TOTAL 70.

PLACE OF ORIGIN N.Y.C. EFFECTIVE SAILING DATE 2/16/42 DATE ARRIVED AT BASE 4/1/42

WK. END. ING	PAYROLL RECORD M	T	W	T	F	S	S	REG. SALARY EARNED	PAID AT BASE	PAID IN N.Y.	BASE ADVICE NUMBER	AMOUNTS RECOVERED N.Y. P/R No.	AMOUNT	SOURCE	UNDER PAYMENT	OVERTIME HRS.	AMT.	PAID O.T.	NOTES
1-3	SU	6U	SU	SU	RE	RE		23 38	2 88	—					21 -				
10								95 —	7 —	—									
17								95 —	7 —	—									
24								95 —	7 —	—									
31								95 —	7 —	63 -					119 -				
4-7	Reinstated							—	—	217 -	4005	1278			100 -				
7							6U	79 17	5 84	63 -					110 33				
14	SU	SU	SU	SU	SU	SU			—	63 -									
21	SU	SU	SU	SU	SU	SU		—	—	63 -									
28	SU	SU	SU	SU	SU	SU		—	—	88 -									
3-5	INCRONIC @ 95 WK							—	—	174 -		136 -							
7	SU	SU	SU	SU	SU	SU		—	—	88 -									
14								60 -	—	53 -									
21										53 -		1384	36 85	C.N	116				
28								60 -		53 -									
4-4								60 -		53 -									
11								60 -		53 -									
18								60 -		53 -									
25								60 -		—									
5-2								60 -		18 -									
9								60 -		—									
16								60 -		333									
23								60 -		53 -									
30								60 -		53 -		1410							
6-6								60 -		53 -									
13								30 -		26 50									
19										19 53									
										1346 66					134 32				

TOTAL 1476 10

SERIAL No. F 1326 | NAME Filardo, Frank Paul | OCCUPATION Cook 1/1

123

SOC. SEC. No. 025-03-0133 CONTRACT RATE 70. REG. N. Y. 63. REG. BASE 7. REG. TOTAL 70.00

PLACE OF ORIGIN N.Y.C. EFFECTIVE SAILING DATE 2/16/42 DATE ARRIVED AT BASE 1/12

WK. END-ING	PAYROLL RECORD M	T	W	T	F	S	S	REG SALARY EARNED	PAID AT BASE	PAID IN N. Y.	BASE ADVICE NUMBER	AMOUNTS RECOVERED N. Y. P/R No.	AMOUNT	SOURCE	UNDER PAY-MENT	OVERTIME HRS.	AMT.	NOTES

TOTAL

SEAL No. S 1328 | NAME Filardo, Frank Paul | OCCUPATION Cook

188 In Supreme Court of New York

Affidavit of No Opinion.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

HAROLD J. RABY, being duly sworn deposes and says that he is an Assistant United States Attorney in the office of John F. X. McGohey, United States Attorney for the Southern District of New York, Attorney for the appellants herein, and as such he is in charge of this case.

That no opinion was rendered or filed by the Court below in making the decision from which the appeal herein is taken.

HAROLD J. RABY.
Harold J. Raby

Sworn to before me this
14th day of March, 1947.

ALMA M. ABBOTT
Alma M. Abbott
Notary Public
Kings Co. Clk's No. 278, Reg. No. 200-A-7
N. Y. Co. Clk's No. 373, Reg. No. 200-A-7
Commission Expires March 30, 1947

---

189 In Supreme Court of New York

Stipulation as to Exhibits.

IT IS HEREBY STIPULATED and AGREED that the Plaintiff's Exhibit 2, for identification and Defendants' Exhibits B and C for identification, may be omitted from the case on appeal.

Dated: New York, N. Y., March 25, 1947.

JOHN F. X. MCGOHEY,
John F. X. McGohey,
United States Attorney.
Attorney for Appellant.

CHESTER A. LESSLER,
Chester A. Lesler,
Attorney for Respondent.

190 In Supreme Court of New York

Stipulation Settling Case.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the foregoing case contains all the evidence given upon the trial herein and all exceptions of both parties, and that an order may be entered herein settling the same as such and ordering the same on file as the case on appeal without further notice.

Dated: March 25, 1947.

JOHN F. X. MCGOHEY,
John F. X. McGohey,
United States Attorney,
Attorney for Defendants-Appellants.

CHESTER A. LESSLER,
Chester A. Lessler,
Attorney for Plaintiff-Respondent.

In Supreme Court of New York

Order Settling and Filing Case.

ORDERED that the foregoing record, case, and bill of exceptions contains all of the evidence given upon the trial herein, together with the exceptions of both parties taken upon said trial, and the same is hereby settled and directed to be filed.

Dated: April 30, 1947.

EDGAR J. NATHAN, JR.,
Justice of the Supreme Court.

---

191 In Supreme Court of New York

Stipulation Waiving Certification.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto, pursuant to Section 170 of the Civil Practice Act, that the foregoing are true copies of the judgment roll, and notice of appeal, the case and exceptions as settled and the whole thereof now on file in the office of the Clerk of the County of New York, and that certification thereof is hereby waived and

that an order directing the filing of the record in the Appellate Court may be entered without further notice.

Dated at New York this 25th day of March, 1947.

JOHN F. X. McGOHEY,
John F. X. McGohey,
United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellants.

CHESTER A. LESSLER,
Chester A. Lessler,
Attorney for Plaintiff-Respondent.

In Supreme Court of New York

Order Filing Record in Appellate Division.

Pursuant to the foregoing stipulation, it is ordered that the foregoing record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department.

Dated at New York this 30 day of April, 1947.

EDGAR J. NATHAN, JR.,
Justice of the Supreme Court.

---

192 In Supreme Court of New York

Plaintiff's Notice of Appeal to the Court of Appeals

SIR:

PLEASE TAKE NOTICE that the plaintiff hereby appeals to the Court of Appeals from the order and judgment of the Appellate Division, First Judicial Department, made and entered in the office of the clerk, County of New York, on the 7th day of August, 1947 which said judgment reversed the judgment in favor of the plaintiff and against the defendants obtained in the Supreme Court of the State of New York, and entered in the office of the clerk of the County of New York, and dismissed the complaint with costs to the defendants on the 8th day of January, 1947 and this appeal is from each and every part of said judgment of reversal.

Dated: New York, September 19, 1947.

Yours, etc.

CHESTER A. LESSLER
Attorney for Plaintiff
Office & P. O. Address
551 Fifth Avenue
New York 17, N. Y.

To: John F. X. McGohey
Attorney for Defendants

193 At a term of the Appellate Division of the Supreme Court held in and for the first Judicial Department in the County of New York, on the 30th day of June, 1947.

Present—Hon. Edward S. Dore, Albert Cohn, Joseph M. Callahan, John Van Voorhis, David W. Peck, *Justices.*

FRANK PAUL FILARDO, *Plaintiff-Respondent*

v.

FOLEY BROS. INC., and SPENCER, WHITE & PRENTIS, INC., *Defendants-Appellants*

ORDER OF REVERSAL ON APPEAL FROM JUDGMENT

Order Appealed From

An appeal having been taken to this Court by the defendants from the judgment of the Supreme Court, New York County, entered on the 8th day of January, 1947 and said appeal having been argued by Mr. Harold J. Raby of counsel for the respondent; and due deliberation having been had thereon,

It is hereby ordered and adjudged (two of the justices dissenting) that the judgment so appealed from be and the same is hereby, in all things, reversed upon questions of law, with costs to the appellants, and that the complaint be, and the same hereby is,

194 dismissed with costs.

ENTER

A. C.

Notice of settlement of the foregoing order is hereby waived this 2nd day of July, 1947.

CHESTER A. LESSLER,
Attorney for Plaintiff-Respondent.

---

195 In Supreme Court of New York
County of New York

FRANK PAUL FILARDO, *Plaintiff,*

v.

FOLEY BROS. INC., and SPENCER, WHITE & PRENTIS, INC., *Defendants.*

JUDGMENT OF REVERSAL

15220—43

Judgment Appealed From

The defendants above-named having appealed from the judgment entered in this action on the 8th day of January, 1947, in the

office of the Clerk, New York County, and the appeal having been heard at a Term of the Appellate Division of the Supreme Court, First Judicial Department, held at 25th Street and Madison Avenue on the 28th day of May, 1947, and an order of said Appellate Division made reversing said judgment, and ordering that the complaint herein be dismissed with costs,

Now, on motion of JOHN F. X. MCGOHEY, Esq., attorney for defendants-appellants, it is

ADJUDGED that the judgment entered in this action on the 8th day of January, 1947, in the office of the Clerk, of New York County, be, and the same hereby is, reversed on questions of law, with costs to the appellants, and that the complaint be, and the same hereby is, dismissed with costs in the Appellate Divi-
196 sion and this Court as taxed in the sum of $644.68, and that the defendants Foley Bros., of 10 East 40th Street, New York City, and Spencer, White & Prentis of 10 East 40th Street, have judgment against Frank Paul Filardo, of Hotel Bristol, West 48th Street, New York City, in the sum of $644.68 and that defendants have execution therefor.

Dated: New York, N. Y., August 7th, 1947.

ARCHIBALD R. WATSON
Clerk

---

197 In Supreme Court of New York, Appellate Division
First Department, May , 1947.

Edward S. Dore, Albert Cohn, Joseph M. Callahan, David W. Peck, John Van Voorhis, *JJ.*

17805

FRANK PAUL FILARDO, *Respondent,*

v.

FOLEY BROS., INC., and SPENCER WHITE & PRENTIS, INC., *Appellants.*

Appeal from a judgment of the Supreme Court, New York County, entered on a verdict in favor of plaintiff.

Harold J. Raby of counsel (John F. X. McGohey, United States Attorney) for appellants.

Chester A. Lessler for respondent.

Opinion

CALLAHAN, *J.:*

The defendants who are Government contractors appeal from a judgment in favor of the plaintiff for overtime wages claimed to be

due under the Federal Eight Hour Law (U. S. Code, tit. 40, Sec. 321-326). The plaintiff was employed as a cook in Iraq and Iran, where the defendants were engaged in the building of certain roads and public construction pursuant to contract with the State Department of the United States.

198 Prior to 1940 the Federal Eight Hour Law had been authoritatively construed to be in the nature of a statutory direction that eight hours were regarded as a proper day's work and that government contracts were to be negotiated on that basis. It had been held that the statute did not confer any right of action for overtime wages upon a workman (United States v. Martin, 94 U.S. 400; United States v. Moses, 126 Fed. 58; Timmonds v. United States, 84 Fed. 933; Coleman v. United States, 81 Fed. 824). It is true that these decisions concerned claims against the United States. However, in respect to the question of statutory construction involved in this case we find no basis for any distinction between such cases and the present action relating to a claim against the individual contractors.

In 1940 the Federal statute was amended by the enactment of section 325a (Sept. 9, 1940, chap. 717, Title III, Sec. 303, 54 U. S. Stat. 884, U. S. Code, title 40 Sec. 325a), providing as follows:

> "Sec. 325a. Same; Computation of wages on basis day rate of eight hours; work in excess of day rate.
>
> Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day
> 199 and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one half times the basic rate of pay."

The plaintiff contends that this amendment was intended to change the law so as to confer a right of action for overtime wages. In this connection he calls our attention to United States v. Post (148 U.S. 124), where a recovery was permitted under the Act of May 24, 1888 (chap. 308, 23 U.S. Stat. 157) relating to letter-carriers. The Act involved in the Post case, however, specifically provided that these postal employees in the service of the Government should be paid for overtime in excess of eight hours per day in proportion to their regular salary as fixed by law. It is thus apparent that a violation of that statute would give a cause of action to the employees intended to be benefited thereby. It is significant that section 325a on which the plaintiff asserts his right to recover in this case contains no directory provision for payment of overtime compensation and is thus not analogous to the statute involved

in United States v. Post, supra. (See Timmonds v. United States, supra; Coleman v. United States, supra.)

It is to be noted that the Federal Eight Hour Law makes any violation thereof punishable as a misdemeanor (Sec. 322), and further provides that all Government contracts calling for the employment of laborers and mechanics shall contain a provision against requiring or permitting such employees to work more than eight hours per day, with a stipulation for a specified penalty
200 accruing to the Government for each violation of the law (Sec. 324). Accordingly, it seems to us that section 325a may well be construed as merely intending to eliminate the criminal liability of an employer prescribed by section 322 and the penalty imposed by section 324 for a work-day beyond eight hours, provided all hours in excess thereof shall be compensated at 1½ times the basic rate specified in the law. This amendment would not necessarily reflect a legislative intent to alter the general purpose of the Federal Eight Hour Law as it had been construed over a period of many years. To change a law long regarded as merely declarative of public policy and penal in nature into a statute affording to aggrieved employees a remedy by civil action would seem to call for a clearer expression of legislative purpose than has been manifested by Congress in this case. When it intended to create a cause of action for overtime wages, Congress experienced no difficulty in making its intention clear. (See, e.g., Fair Labor Standards Act of 1938, Sec. 16b, U. S. Code, tit. 29, Sec. 216b.) We fail to find any such intention express or implied in the addition of section 325a to the Federal Eight Hour Law.

In view of this conclusion it becomes unnecessary to consider the other questions presented on this appeal.

The judgment should be reversed, with costs to the appellants, and the complaint dismissed, with costs.

Dore and Cohn, *JJ.*, concur.

Peck and Van Voorhis, *JJ.*, dissent and vote to affirm.

---

201 In Court of Appeals of New York

Order to Dispense With Printing

A motion having heretofore been made herein upon the part of the plaintiff for leave to have appeal heard on Appellate Division records and upon typewritten copies of additional papers and of briefs, papers having been submitted thereon and due deliberation having been there upon had, it is

Ordered, that the said motion be and the same hereby is granted.

A copy

Raymond J. Cannon
Deputy Clerk

202 *Stipulation Waiving Certification to the Court of Appeals*

Pursuant to Section 170 of the Civil Practice Act it is hereby stipulated that the foregoing consists of true and correct copies of the record on appeal to the Appellate Division of the Supreme Court, First Department, notices of appeal to the Court of Appeals, judgment of affirmance and order of affirmance and opinion of said Appellate Division now on file in the office of the Clerk of the County of New York and certification thereof by the Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated, New York, Oct. 14, 1947.

CHESTER A. LESSLER
Chester A. Lessler
Attorney for Plaintiff-Appellant.

JOHN F. X. MCGOHEY
John F. X. McGohey
Attorney for Defendant-Respondents.

---

203 (Certificates to opinion omitted)

---

204 In Court of Appeals of New York

Opinion—March 11, 1948

FULD, J.

In 1941, defendants entered into a cost-plus contract with the United States Government to construct roads, buildings and bases in the Near East in connection with our military effort. By a clause in that contract, defendants agreed to "obey and abide by all applicable laws * * * of the United States." In effect at that time was the Federal Eight-Hour Law (U. S. Code, tit. 40, §§ 321-326), which, in general, after prohibiting work by laborers on government jobs in excess of eight hours a day (§§ 324, 325), went on to provide that such overtime work was to be "permitted upon compensation" for all hours over eight at not less than one and one-half times the employee's basic rate of pay (§§ 325a, 326).

Some months after the execution of their agreement with the government, defendants, by a contract made in this country, hired plaintiff, a citizen of the United States, as a cook, at a wage of $60 a week, on their jobs in Iran and Iraq. Plaintiff went to those countries and there, for seventy-four weeks, during 1942 and 1943, labored frequently for more than eight hours a day. He requested payment for the overtime hours and, when his demands were re-

jected, brought this action, asserting that he was entitled to overtime pay at the rate specified in the eight-hour law.

The jury found that plaintiff had worked 1,172 overtime hours and returned a verdict of $2,492.36, with interest. The Appellate Division reversed the judgment and dismissed the complaint upon the ground that the Federal statute did not give an employee the right to recover compensation for work in excess of eight hours a day even though it proscribed a work day longer than eight hours and rendered employers liable to criminal prosecution if that limit were exceeded. With that determination we disagree; in our opinion, plaintiff—whose status as a "laborer" within the compass of the statute is not challenged—may recover either upon a
205 cause of action afforded by the Eight Hour Law or as a third party beneficiary of the primary contract between defendants and the Federal Government.

Since both of plaintiff's grounds for recovery turn upon the language and purpose of the eight-hour law, it will be useful at the outset to examine its history. It evolved from a statute, first enacted in 1868, which merely declared "That eight hours shall constitute a day's work for all laborers, workmen and mechanics now employed, or who may be hereafter employed, by or on behalf of the Government of the United States" (15 Stat. 77, ch. 72). As reenacted in 1892 (27 U. S. Stat. 340, ch. 352), the statute added a criminal sanction, making it a misdemeanor for any agent or officer of the government or any government contractor intentionally to violate the eight-hour limit (present § 322). Amendments in 1912 supplied provisions which today appear as sections 324 and 326 of title 40 of the United States Code. As noted above, in effect they demanded that, with certain specified exceptions, every contract for public works, made by or for the United States, contain a provision that no laborer or mechanic be required or permitted to work more than eight hours a day and that "every such contract" contain a stipulation for a penalty of $5 a day in case the eight-hour limit be violated (§ 324). In emergencies, however, an employer was privileged to have men work beyond that limit without incurring penalties (§ 325). In 1917, our entrance in the first World War impending, Congress voted the President powers to suspend the eight-hour limit on work covered by government contracts in "case of national emergency", "*Provided*" that premium pay at not less than one and one-half times the regular rate was given employees who worked longer than the basic eight-hour day upon such contracts (39 U. S. Stat. 1192, ch. 180), and those powers are continued in section 326 of the present statute.

In June, 1940—after the outbreak of the second World War—when it once again became necessary to accelerate production and

expedite defense activities, Congress suspended the eight-hour limitation in defense work (U. S. Code, tit. 50, Appendix, § 1155; subd. [b]). A few months later, in September, 1940, the suspending legislation was superseded by the enactment of section 325a (U. S. Code, tit. 40, § 325a), and it is upon its construction that decision herein primarily depends. The new provision explicitly recited that "work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay." With that amendment, the Eight-Hour Law assumed its present content. A government contractor was again subject to prosecution for a misdemeanor (§ 322) and to payment of liquidated penalties of $5 a day (§ 324) if he employed laborers for longer than eight hours a day.

While the statute does not in so many words grant to the employee a cause of action if such compensation is not received,
206 it is settled that such remedial legislation is to be given a liberal construction to effectuate its purpose and aim. (See *National Labor Relations Bd.* v. *Hearst Publications*, 322 U. S. 111, 129; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 259-260; *Warner* v. *Goltra*, 293 U. S. 155, 158; *Wa'ling* v. *Patton-Tully Transp. Co.*, 134 F. 2d 945.) The statute in terms provides that overtime work was to be permitted "*upon compensation*" at not less than time and one-half for such overtime. (Emphasis supplied.) Manifestly, that language must be read as an affirmative direction that compensation for overtime work shall be paid and may be collected whenever the hours of work exceed the statutory limit. Any doubt on this score is dispelled when one glances at the language of section 326—not here involved—which applies when the President suspends the operation of the eight-hour limit; it permits such suspension "*Provided*, That the wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours work, with overtime rates to be paid for at not less than time and one-half". That is plainly a mandate to pay extra compensation for overtime work during the period of the law's suspension, and, since Congress could not have intended to deny overtime pay for work performed during the time the law is in effect, while granting it is when it is suspended, both sections—325a and 326—should be read alike. So read, the statute differs little from the Letter Carriers Act (25 U. S. Stat. 157, ch. 308), which has been interpreted to bestow a right to sue upon employees within its coverage. (See *United States* v. *Post*, 148 U. S. 124.)

There can be little question that the statute was passed for the benefit and protection of the laborer and, in such a case, a party who has "suffered from a disregard and violation of the duty [imposed by statute] has a cause of action for his damages against

the one who has disregarded his duty", even though the statute does not explicitly provide for such a remedy. (*Abounader* v. *Strohmeyer & Arpe Co.*, 243 N. Y. 458, 465; see, also, *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 751; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 456-458.) With the beneficial purposes of the statute so manifest, if plaintiff may not sue to enforce it, the benefits accorded would indeed be empty and illusory. He would find himself in the position of having been given a benefit he is unable to enjoy, a right he is helpless to enforce.

Analogously, State minimum wage laws have been interpreted to permit suit by an aggrieved employee to recover the wages therein specified, though the statute merely made payment at less than the specified rate criminally punishable and did not expressly grant a right of civil action. (See *McNulty* v. *City of New York*, 238 N. Y. 29; *City of Phoenix* v. *Drinkwater*, 46 Ariz. 470; 207 cf. *Austin* v. *City of New York*, 258 N. Y. 113; *Campbell* v. *City of New York*, 128 Misc. 382.) In the *Drinkwater* case (supra, p. 474), the Arizona court, observing that in determining the meaning of a statute, courts must consider "both the evil to be remedied and the result which the legislature desires to reach", went on to say (p. 475): "The statute, it will be seen, has a two-fold purpose. One is to secure to the individual workman a minimum living wage, fixed by law, and the other is to penalize the employer who fails to pay that wage. With both purposes before us, we certainly think that it would be defeating the intent of the legislature, so far as the first is concerned, if we were to hold that the very ones whom the law was intended to protect were helpless to secure that protection, and must satisfy themselves with knowing that somebody had gone to jail or paid a fine for violating the law. Such would indeed, be a Pyrrhic victory for the workman, consoling perhaps to his feelings, but of very little value in giving to him what the law says he has earned and is due him." And so here. If we recognize—as we believe we must—that the Eight-Hour Law sought to elevate labor standards in employment on public works by requiring the employer to pay extra compensation for hours in excess of eight (see *Walling* v. *Patton-Tulley Transp. Co.*, *supra*, p. 949), it would be both unreasonable and unjust to say that that laborer has no claim for such overtime pay. We conclude that such could not have been the legislative purpose.

Nor do we deem it of controlling significance that this statute is silent, while another, the Fair Labor Standards Act of 1938 (U. S. Code, tit. 29, § 216, subd. [b]), is explicit in declaring that employers who violate that act—in not paying the prescribed minimum wage or overtime compensation—shall be civilly liable to the injured employees. That act entitled the employee not only to

damages suffered—the specified minimum wage or overtime pay—but also to an additional sum as liquidated damages. Obviously, in such a case, the employee would be in no position to claim such double damages without explicit statutory authorization.

It is urged that the interpretation which we place on the Eight-Hour Law is precluded by *United States* v. *Martin* (94 U. S. 400). Decision in that case, and in the others which followed it, was rendered at a time when the statute simply announced a desirable work standard and made no mention of overtime compensation. The addition—in 1940—of the provision for further compensation at a prescribed minimum rate for work in excess of eight hours a day makes it abundantly clear that the statute is now designed to do more than merely declare a desirable policy. If, as con-
208 tended, the specification of extra pay for overtime was intended only to relieve employers from criminal penalties imposed by other sections for demanding or permitting such work, enactment of section 325a, requiring premium pay for overtime, would have been unnecessary and superfluous. A few months earlier Congress had suspended the operation of the Eight-Hour Law as to all persons employed on work for the armed forces (U. S. Code, tit. 50, Appendix, § 1155, subd. [b])—undoubtedly embracing the vast majority of government contractors. As to them, the suspension of the law was effective relief from criminal or other penalties for overtime work, and other employers could have been relieved simply by making the provision more inclusive. That being so, the measure actually enacted—restoring the eight-hour day as the basis for computing wages of workmen on government jobs and permitting longer hours "upon compensation" for overtime—demonstrates that Congress was intent not only upon relieving employers of penalties, but upon securing extra pay to laborers for longer hours of work.

The fact that plaintiff worked abroad presents no obstacle to his recovery. The Eight-Hour Law involves a subject matter in which the United States is vitally concerned—work standards on its own public works and projects. Unquestionably, Congress had the power in such cases to prescribe hours of work and rates of pay and to insist that such standards be observed regardless of where the work is to be performed (see 25 U. S. Atty. Gen. [1905], p. 441). By its terms, the statute embraces "*Every contract* made to which the United States * * * is a party, and every such contract made for or on behalf of the United States" (§ 324). (Emphasis supplied.) Words of such inclusive reach cannot properly be read to exclude contracts for government jobs abroad. (See Executive Order No. 8623, Code of Fed. Reg., Cum. Supp. tit. 3, p. 850, wherein the President took a similar view; cf. *Connell* v. *Vermilya-Brown Co.*, 164 F. 2d 924.) Insofar as the civil aspects

of the statute are concerned—and we consider no other—it clearly applies to such work, at least when performed by United States citizens under a contract of employment entered into in this country, and, so applied, we see no constitutional objection to its enforcement. In much the same manner, obligations imposed by the workmen's compensation and liability insurance laws of one State are held enforcible even though the accident occurs in another State. (See, e.g., *Matter of Post* v. *Burger & Gohlke*, 216 N. Y. 544, 549; *Industrial Comm.* v. *McCartin*, 330 U. S. 622, 626; *Alaska Packers' Assn.* v. *Industrial Accident Comm.*, 294 U. S. 532, 542, 543; cf. *Levy* v. *Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333.)

In any event—and quite apart from the cause of action given by the statute—plaintiff clearly has a right to sue on the basis of the contract between defendant and the Federal Government. By "principles of general contract law"—here controlling since we are concerned with the construction of a contract of the Federal Government (see *Priebe & Sons* v. *United States*, 332 U. S. 407, 411; see, also, *United States* v. *Standard Rice Co.*, 323 U. S. 106, 111)—as well as by the law of New York, suit on a contract may be maintained by a third party beneficiary. (See *German Alliance Ins. Co.* v. *Home Water Co.*, 226 U. S. 220, 230; *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303, 307; *United States* v. *Morley Constr. Co.*, 98 F. 2d 781, 789; see, also, 2 Williston on Contracts [Rev. ed.], § 357, p. 1049; Restatement, Contracts, § 133, par. [1], subd. [a]; § 145, subd. [a]; *Lawrence* v. *Fox*, 20 N. Y. 268; *Seaver* v. *Ransom*, 224 N. Y. 233.) In this case, as noted above, defendants, by their contract with the government, expressly agreed to "obey and abide by all applicable laws * * * of the United States", and that, of course, included the eight-hour law. In our view, that agreement when related to the statute, was, in effect, a promise to pay their workers such extra compensation for overtime work, and, entitled an aggrieved laborer or mechanic to enforce that promise as a third party beneficiary. (See *United States* v. *Morley Constr. Co.*, *supra*, p. 789; *Crabb* v. *Welden Bros.*, 65 Supp. 369, 377; see, also, *Seaver* v. *Ransom*, *supra*, p. 238; *Fata* v. *Healy Co.*, 289 N. Y. 401; *Strong* v. *American Fence Constr. Co.*, 245 N. Y. 48; *Novosk* v. *Reznick*, 323 Ill. App. 544.)

209

The determination of the Appellate Division dismissing the complaint was erroneous and must be reversed. Since, however, the Appellate Division reversed the judgment of the Trial Term on the law alone, the Civil Practice Act compels us (1) to presume that the Appellate Division did not consider any questions of fact in the case (§ 602), and, upon reversing, (2) to remit the case to the Appellate Division for determination upon any questions of

fact raised in that court (§ 606). Such a remission is here required because a question of fact, disputed at the trial, as to the number of overtime hours that plaintiff worked, may have been raised on the appeal in the Appellate Division.

The judgment of the Appellate Division should be reversed, and the case remitted to the Appellate Division for determination upon the questions of fact, if any, raised in that court, with costs in this court and in the Appellate Division to abide the event.

LOUGHRAN, Ch. J., LEWIS, CONWAY, DESMOND, THACHER and DYE, JJ., concur.

Judgment reversed, etc.

---

210 In Court of Appeals of New York

STATE OF NEW YORK, *ss:*

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of March in the year of our Lord one thousand nine hundred and forty-eight, before the Judges of said Court.

WITNESS,
The HON. JOHN T. LOUGHRAN,
Chief Judge, presiding.
JOHN LUDDEN, Clerk.

Remittitur.....*March 12, 1948*

211 FRANK PAUL FILARDO, *Appellant*,

ag'st.

FOLEY BROS. INC., and ano., *Respondents*.

BE IT REMEMBERED, that on the 30th day of .....October..... in the year of our Lord one thousand nine hundred and Forty-seven. .....Frank Paul Filardo..... the appellant in this cause came here unto the Court of Appeals, by Chester A. Lessler, his ..... attorney, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the .....First..... Judicial Department. And Foley Bros., Inc., and ano., ... the respondents in said cause, afterwards appeared in said Court of Appeals by John F. X. McGohey, United States Attorney for the Southern District of New York.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

212 WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Chester A. Lessler..... of counsel

for the appellant, and by Mr. Harold J. Raby ..... of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the ..... judgment ..... of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and case remitted to the Appellate Division for determination upon the questions of fact, if any, raised in that Court, with costs in this court and in the Appellate Division to abide the event.

And it was also further ordered, that the records aforesaid, and the proceedings in this court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

213 THEREFORE, it is considered that the said judgment of the Appellate Division be reversed and case remitted to the Appellate Division &c as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

JOHN LUDDEN
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE.
Albany, March 12, 1948.

(Seal of the Court of Appeals,
State of New York, affixed)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

JOHN LUDDEN
Clerk

214 At a term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department in the County of New York, on the 22nd day of March, 1948.

Present:—Hon. David W. Peck, Presiding Justice; Hon. Albert Cohn, Hon. Joseph M. Callahan, Hon. John Van Voorhis, Justices.

Frank Paul Filardo, *Plaintiff*,

—against—

Foley Bros., Inc., and Spencer, White & Prentis, Inc., *Defendants*.

Order upon Reversal by the Court of Appeals of the Previous Order of the Appellate Division.

An appeal having been taken to the Court of Appeals by the plaintiff from the judgment entered in the office of the clerk of the County of New York, on the 7th day of August, 1947, entered on the order of this court entered herein on the 30th day of June, 1947, which reversed (two of the Justices dissenting), upon questions of law, a judgment of the Supreme Court, New York County, entered herein on the 8th day of January, 1947 in favor of plaintiff and dismissed the complaint,

And said appeal having been heard by the Court of Appeals, and, after due deliberation, the Court of Appeals having rendered its decision and opinion, reversing the judgment of the Appellate Division entered on the 7th day of August, 1947 and remitting to the Appellate Division for determination upon questions of fact, if any, raised in that court, with costs in the Court of Appeals and in the Appellate Division to abide the event; and upon reading the remittitur of the Court of Appeals dated March 12th, 1948, and

This court having duly considered the findings of fact made by the jury at Trial Term and having affirmed said findings of fact,

215 Now, therefore, upon motion of Chester A. Lessler, attorney for the plaintiff, it is hereby

Ordered and adjudged that the order and judgment of the Court of Appeals entered herein on the 12th day of March, 1948 be and the same hereby is made the order and judgment of this court, and it is further

Ordered and adjudged that the judgment of the Supreme Court, New York County, entered herein on the 8th day of January, 1947 be and the same is hereby affirmed with costs in this court and in the Court of Appeals to the plaintiff.

ENTER

J.M.C.

The undersigned hereby consents to the entry of the within foregoing order and notice of settlement is hereby waived.

Dated: New York, March 19th, 1948.

JOHN F. X. MCGOHEY
Attorney for Defendants

---

216 In Supreme Court of New York
Appellate Division: First Department

FRANK PAUL FILARDO, *Plaintiff*,

—against—

FOLEY BROS. INC., and SPENCER WHITE & PRENTIS, INC.,
Defendants.

Judgment of Reversal of the Order of the Appellate Division, First Department and Reinstatement of the Judgment at Trial Term.

The plaintiff, above named, having appealed to the Court of Appeals from the judgment entered in this action on the 7th day of August, 1947 in the Office of the Clerk of New York County, entered upon an order of reversal by the Appellate Division, First Department of a judgment entered in this action in favor of the plaintiff on the 8th day of January, 1947 which order of reversal reversed said judgment and dismissed the complaint and entered a judgment in favor of the defendant and an appeal having been heard from said order of reversal of the Appellate Division of the Supreme Court, First Judicial Department at a term of the Court of Appeals, Albany, New York on the 17th day of November, 1947, and an order of said Court of Appeals having been made reversing said order of the Appellate Division, First Judicial Department and judgment entered thereon, and the Appellate Division, First Department having made an order on the 22nd day of March, 1948 affirming the finding of fact made at the trial term herein and which order further orders that the judgment of the Supreme Court, New York County, entered on the 8th day of January, 1947 be affirmed with costs in the Appellate Division, First Department and costs in the Court of Appeals to the plaintiff,

Now, on motion of CHESTER A. LESSLER, attorney for plaintiff herein, it is

217 ADJUDGED that the order and judgment of this Court entered on the 7th day of August, 1947 in the Office of the Clerk, New York County be and the same is reversed on questions

of law and findings of fact made by the jury at Trial Term, be and the same hereby is affirmed and that the judgment of the Supreme Court, New York County entered herein on the 8th day of January, 1947 be and the same is hereby affirmed with costs in the Appellate Division and The Court of Appeals in the amount of $266.25 as taxed, and that the plaintiff, FRANK PAUL FILARDO of the Hotel Iroquois, West 44th Street, New York City, have judgment against the defendants, Foley Bros. Inc., and Spencer White & Prentis, ~~Inc. of 10~~ East 40th Street, New York City in the sum of $266.25 and that the plaintiff have execution therefor.

Dated: New York, March 24, 1948.

ARCHIBALD R. WATSON
Clerk

[Clerk's Certificate to foregoing transcript omitted in printing]

☆ U. S. GOVERNMENT PRINTING OFFICE 1948—793007/P. O. 97

Supreme Court of the United States

Order allowing certiorari

Filed October 11, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of New York, County of New York, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

812398—48

INDEX

	Page
Opinions below	1
Jurisdictional statement	2
Questions presented	3
Statutes involved	4
Statement	4
Specifications of errors to be urged	7
Reasons for granting the writ	7
Conclusion	24
Appendix	25

CITATIONS

Cases:

Abbs v. *Ford Motor Co.*, E.D. Mich. Civil No. 6880	11
Adams v. *Long*, 202 S. W. (2d) 112	10
American Banana Co. v. *United Fruit Co.*, 213 U. S. 347	11, 14, 16
Anderson v. *J-M Service Corp.*, D. Kansas No. 1671	11
Assel v. *Hercules Powder Co.*, D. Kansas No. 5995	11
Bernhard v. *Metcalfe Const. Co.*, 64 F. Supp. 953	14
Blackmer v. *United States*, 284 U. S. 421	16
Blain, Ex parte, 12 Ch. Div. 522	11
Bumpus v. *Remington Arms Co.*, 77 F. Supp. 94	10
Burns v. *Metcalfe Const. Co.*, 69 F. Supp. 381	14
Caldarola v. *Eckert*, 332 U. S. 155	2, 23
Chatwin v. *United States*, 326 U. S. 455	12
Clearfield Trust Co. v. *United States*, 318 U. S. 363	2, 23
Coleman v. *United States*, 81 Fed. 824	17
Connell v. *Vermilya-Brown Co.*, 164 F. 2d 924, certiorari granted, March 29, 1948, No. 608, this Term	14
Crabb v. *Welden Bros.*, 65 F. Supp. 369, reversed on other ground, 164 F. 2d 797	10
Cromer v. *Hercules Powder Co.*, D. Kansas No. 6120	11
Deal & Co., Inc. v. *Marlin*, 209 Ark. 967	10
Federal Crop Insurance Corp. v. *Merrill*, 332 U. S. 380	2
Filardo v. *Foley Bros., Inc.*, 181 Misc. 136	14
Frost & Co. v. *Coeur d'Alene Mines Corp.*, 312 U. S. 38	2
German Alliance Insurance Co. v. *Home Water Supply Co.*, 226 U. S. 220	23
Greenstein v. *Pan American Airways, Inc.*, 185 Misc. 429	10
Harrington v. *Empire Construction Co.*, 71 F. Supp. 324	10

Cases—Continued	Page
Holy Trinity Church v. *United States*, 143 U. S. 457	12
Kasper v. *National Electric Products Corp.*, 165 F. 2d 434	10
Kelly v. *Grimshaw*, 161 Kan. 253	10
Kuly v. *White Motor Co.*, 11 Labor Cases, Par. 63,434	11
Lawrence v. *Fox*, 20 N. Y. 268	23
MacEvoy Co. v. *United States*, 322 U. S. 102	15
McDaniel v. *Brown & Root, Inc.*, 7 WH Cases 978	10
McGuire v. *Hercules Powder Co.*, 7 WH Cases 658	11
Moehl v. *duPont*, 12 Labor Cases, Par. 63,545	10
Perkins v. *Lukens Steel Co.*, 310 U. S. 113	18
Robins Dry Dock & Repair Co. v. *Flint*, 275 U. S. 303	23
Smith v. *Townsend*, 148 U. S. 490	12
State v. *Carter*, 27 N. J. (3 Dutcher) 499	11
Sweet v. *B. F. Goodrich Co.*, 68 F. Supp. 782	11
Timmonds v. *United States*, 84 Fed. 933	16
United States v. *Allegheny County*, 322 U. S. 174	2, 23
United States v. *Carbone*, 327 U. S. 633	12
United States v. *Martin*, 94 U. S. 400	16
United States v. *Moses*, 126 Fed. 58, certiorari denied, 195 U. S. 632	16
United States v. *Post*, 148 U. S. 124	18
Walling v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945	18
Willis v. *duRont*, 76 F. Supp. 1010	10
Statutes:	
Act of May 24, 1888, 25 Stat. 157	18
Act of August 1, 1892, 27 Stat. 340	14, 15
Act of June 19, 1912, 37 Stat. 137	16
Act of June 28, 1940, c. 440, 54 Stat. 676, 678, 50 U.S.C. App. 1155:	
Sec. 5(a)	18
Sec. 5(b)	18
Bacon-Davis Act, as amended by the Act of August 30, 1935, 49 Stat. 1011, 40 U.S.C. 276a, 276a-2	10, 14, 20
Eight Hour Law (Act of August 1, 1892, 27 Stat 340, as amended; 40 U.S.C. 321, *et seq.*)	2, 4, 10
Sec. 321	7, 20, 25
Sec. 322	7, 15, 26
Sec. 324	7, 16, 27
Sec. 325	7, 29
Sec. 325a	8, 17, 18, 30
Sec. 326	7, 31.
Fair Labor Standards Act, 29 U.S.C. 203(e), 216(b):	
Sec. 3(e)	14
Sec. 16(b)	20
Miller Act, Sec. 1(b), 40 U.S.C. 270a(b)	15

Statutes—Continued Page

Portal to Portal Bay Act, 61 Stat. 84, 29 U.S.C.A. 251, *et seq.* 11, 21
Second Supplemental National Defense Appropriation Act, 1941, 54 Stat. 872 19
Urgent Deficiencies Appropriation Act (Act of February 27, 1906), c. 510, 34 Stat. 27, 33 13
Walsh-Healey Act (Act of June 30, 1936), 49 Stat. 2036, 41 U.S.C. 35, *et seq.* 10, 15, 21

Miscellaneous:

Army Procurement Regulations, Paragraph 5-402.3 22
18 Comp. Gen. 646 22
19 Comp. Gen. 516 14
20 Comp. Gen. 233, 235-236 18
20 Comp. Gen. 890 22
21 Comp. Gen. 1110, 1112 18, 22
24 Comp. Gen. 376, 377 17, 22
86 Cong. Rec. 11216-11217 19
86 Cong. Rec. 11569 19
Executive Order 9240, as amended, 7 F.R. 7159, 7419 10
Hearings before Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st sess., pp. 2719-2720 21
H.R. 10263, 76th Cong., 3d Sess. 19
H. Rep. 2916, 76th Cong., 3d Sess., p. 5 19
Mathews, *Labor Standards Provisions in Government Foreign Procurement Contracts*, 42 Ill. L. Rev. 141 9, 14
25 Op. A. G. 441 13
29 Op. A.G. 488 14
34 Op. A.G. 257, 259-260, 261 12, 13
39 Op. A.G. 418 16
Restatement Contracts § 145 23
W. D. Procurement Regulation No. 346 22

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 91

FOLEY BROS., INC. AND SPENCER, WHITE & PRENTIS, INC., PETITIONERS

v.

FRANK PAUL FILARDO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

The Solicitor General, on behalf of Foley Bros., Inc., and Spencer, White & Prentis, Inc.,[1] prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York entered on March 24, 1948, on remittitur from the Court of Appeals (R. 141-142).

OPINIONS BELOW

The oral rulings of the Supreme Court of New York, New York County (R. 81, 84), are not re-

[1] The Solicitor General is appearing on behalf of petitioners because, in accordance with the provisions of its contract with petitioners here involved, a wartime "cost-plus" contract, the Department of the Army will ultimately have to pay such judgments as may be here rendered against petitioners.

ported. The opinion of the Appellate Division of the Supreme Court of the State of New York in the First Judicial Department (R. 129-131) is reported at 272 App. Div. 446. The opinion of the Court of Appeals of New York (R. 132-138) is reported at 297 N. Y. 217.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on March 12, 1948 (R. 138-139). The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decision denied a title, right, privilege, or immunity specially set up and claimed by petitioners under the Eight Hour Law (40 U.S.C. 321, *et seq.*), as amended by the Act of September 9, 1940, c. 717, Title III, § 303, 54 Stat. 872, 884, 40 U.S.C. 325a, and under petitioners' contract with the United States. The cases relied on to sustain the jurisdiction of this Court are *Frost & Co.* v. *Coeur d'Alene Mines Corp.*, 312 U. S. 38; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380; *Caldarola* v. *Eckert*, 332 U. S. 155, 158; *United States* v. *Allegheny County*, 322 U. S. 174, 184; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366-367.

Respondent brought suit in the Supreme Court of New York, New York County, to recover overtime compensation for work performed in a foreign country under the Eight Hour Law, as amended, and as third party beneficiary to the

contract between petitioners and the United States (R. 3, 4-5). Petitioners' answer denied that respondent was entitled to recover under either the Eight Hour Law or the contract (R. 5, 6-7). The same issues were raised by a motion to dismiss (R. 48-52), by a motion for directed verdict (R. 81) and by a request for charge to the jury (R. 84), all of which were denied by the trial court (R. 75, 81, 84), and again by an exception to the charge as made to the jury (R. 84) and a motion to set aside verdict (R. 86). In the Appellate Division and the Court of Appeals, petitioners raised the same questions in their written brief and oral argument. The court below rejected petitioners' contention and ruled for respondent (R. 132-138).

The question presented is one of substance as is more fully developed under reasons for granting the writ (*infra*, pp. 7-24).

QUESTIONS PRESENTED

1. Whether the Eight Hour Law is applicable in the performance of a contract between the United States and a private contractor for construction work in a foreign country.

2. Whether, assuming the applicability of the Eight Hour Law in the performance of a Government construction contract, employees of the Government's contractor have recourse to the courts to recover overtime compensation either (a) by reason of a cause of action arising under that statute or (b) as third party beneficiaries of a con-

tractual provision requiring the contractor to comply with the laws of the United States.

STATUTES INVOLVED

The pertinent provisions of the Eight Hour Law (Act of August 1, 1892, 27 Stat. 340, as amended, 40 U. S. C. 321, *et seq.*), are set out in the Appendix *infra*, pp. 25-31.

STATEMENT

The undisputed facts follow:

On November 10, 1941, petitioners entered into a cost-plus contract with the United States whereby petitioners were to construct roads, buildings and bases in the Middle East (R. 4, 98). In the contract, petitioners agreed *inter alia* to "obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, all political subdivisions thereof, or any other duly constituted public authority wherein the work is done" (R. 98). In February, 1942, petitioners hired respondent, an American citizen, to work as a cook on these construction projects at the salary of $60 per week (R. 14, 87, 88). Respondent's contract of employment with petitioners required him to "devote all of his time and attention and give his best efforts and skill to the performance of such services in and about such projects as the Constructors may from time to time assign to him" (R. 89). The employment contract contained no provision for overtime pay, but respondent's weekly salary was set pur-

suant to a formula which set his wages at 150% of 85% of the New York prevailing wage rates (R. 60).

Pursuant to his contract, respondent went to petitioners' projects in Iraq and Iran (R. 15, 82). He worked a total of seventy-four weeks during 1942 and 1943, including the time of his transportation, for all of which he received an average weekly wage of $68.38 (R. 82).[2] During that time he frequently worked more than eight hours a day and requested that he be paid for the work performed in excess of eight hours a day but his request was refused (R. 19-23, 94). Upon his return to the United States, respondent again requested payment for the work performed in excess of eight hours a day, which request was again rejected (R. 22, 95-96).

Respondent, thereafter, on July 29, 1943, brought this suit against petitioners in the Supreme Court of the State of New York, County of New York, under the Eight Hour Law to recover for compensation for work in excess of eight hours a day allegedly due him thereunder[3] (R. 3, 4-5). Petitioners' answer, filed on January 6, 1944, de-

---

[2] Respondent from time to time received various voluntary salary increases (R. 24).

[3] The complaint as amended set forth two causes of action. The first, an attempt to set aside the employment contract and recover in *quantum meruit* for the "reasonable value" of respondent's services, was subsequently dismissed on motion of the petitioners (R. 48, 75). Respondent took no appeal to the Appellate Division from this dismissal, and hence that issue is no longer in the case.

nied that respondent was entitled to any recovery (R. 5, 6-7). A trial was had before a jury. During the course of the trial, petitioners moved to dismiss the complaint on the ground that the Eight Hour Law conferred no right of action on respondent to sue his employer for overtime wages (R. 48-52). The trial court denied the motion, holding that the Eight-Hour Law "* * * applies beyond the limits of the United States. The plaintiff has a right to bring this action" (R. 77, 81). At the close of the trial, petitioners joined in respondent's motion for a directed verdict (R. 81). They thereafter requested the court to charge that there is no right of action for overtime conferred on respondent by the Eight Hour Law, and excepted to its refusal so to charge (R. 84). Petitioners also excepted to the court's charge that the Eight Hour Law conferred a right of action upon respondent for overtime wages (R. 84) and moved to set aside the verdict (R. 86). The jury found that respondent had worked for a total of 1172 hours overtime (R. 85), and that on the basis of one and one-half times his average rate of pay per hour, the sum of $2,496.36 was due him (R. 85). The court added interest in the amount of $650 and costs of $181.60, and entered judgment for $3,327.96 (R. 1, 12, 13).

Upon appeal to the Appellate Division, First Department, the judgment of the Supreme Court was reversed (R. 128). The court concluded, two judges dissenting, that neither the Eight Hour

Law nor the 1940 amendment thereto conferred a right of action for overtime wages, and in view of this conclusion, did not pass on the other questions raised (R. 131). Appeal was taken by respondent to the Court of Appeals, which reversed the judgment of the Appellate Division (R. 132-138).

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals of New York erred:

1. In holding that the Eight Hour Law is applicable in the performance of a contract between the United States and a private contractor for construction work in a foreign country.

2. In holding that the Eight Hour Law conferred a right upon respondent to sue petitioners for compensation for work in excess of eight hours a day.

3. In holding that respondent could maintain a suit against petitioners for compensation for work in excess of eight hours a day as a third party beneficiary of the contract between petitioners and the United States.

4. In reversing the judgment of the Appellate Division of the Supreme Court of New York.

REASONS FOR GRANTING THE WRIT

The Eight Hour Law prior to 1940 (40 U. S. C. Sections 321-326) required contractors with the United States to limit the services of their laborers and mechanics to eight hours per day. The statute

was enforceable criminally and through the withholding of civil penalties by the Government. In 1940 the Act was amended to permit work in excess of eight hours per day if compensated at time-and-a-half the basic rate of pay (40 U. S. C. Section 325a).[4]

The New York Court of Appeals has held that the Eight Hour Law, as amended in 1940, applied to construction work performed for the United States in foreign countries, that respondent had, by virtue of the 1940 amendment, a statutory right of action to recover time and one-half on work in excess of eight hours a day, and that in any event respondent had a contractual right to recover such compensation as a third party beneficiary of the contract between petitioners and the United States. Each of these holdings raise important and substantial questions of Federal law as to which there has been no authoritative decision and as to which a decision of this Court, and not of a state court, should be the governing precedent.

The Department of the Army advises that, during World War II, it permitted many cost-plus

---

[4] The amendment reads as follows:

> Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay.

contractors to pay time and one-half for hours over eight per day on contracts to be performed in foreign countries. This permission was granted as a matter of inducement in order to aid contractors to secure employees for such projects. In these cases, as here, however, the usual Eight Hour Law provision required in domestic contracts was customarily omitted.[5] Many laborers and mechanics were not paid time and one-half for overtime work.[6] We are advised by the Department of the Army that the extension below of the Eight Hour Law to government contracts performed in foreign countries may open the way to many similar claims on such cost-plus contracts. In addition, the decision below that a worker may sue his employer either under the Eight Hour Law as amended or as a third party beneficiary to the government contract containing such a provision, will be relied on in other cases not only as a construction of the Eight Hour Law itself, but also as a precedent for implying a private right of action against an em-

---

[5] None of the 900 foreign procurement contracts entered into by the Board of Economic Warfare included an eight-hour law provision. Instead, pursuant to a labor policy agreed upon by BEW, the Coordinator of Inter-American Affairs and the State Department, two standard forms of labor clause paragraphs were formulated; both these forms referred questions of hours of work, together with other problems of labor relations, to the customs and conditions prevailing at the site of performance in the foreign country. Mathews, *Labor Standards Provisions in Government Foreign Procurement Contracts*, 42 Ill. L. Rev. 141, 146-147.

[6] In the instant case, respondent's weekly wage was, as stated, *supra*, p. 4, computed at 150% of 85% of the rates prevailing in New York.

ployer for work or wages by virtue of contracts involving the Bacon-Davis and Walsh-Healey Acts, and Executive Order 9240, as amended (7 F. R. 7159, 7419) (providing double time for the seventh day).

There is an increasing number of workers' claims against employers for overtime and for additional compensation being filed under these various statutes on the theories adopted below, and the lower courts, both state and federal, are in disagreement as to whether recovery on these theories are permissible.[7] In addition, thousands of other such claims may reasonably be anticipated. In this connection it is important to note that the Eight Hour Law, unlike the Fair Labor Standards,

---

[7] In the following cases the court has held that the worker has no right to sue under these statutes or under contract provisions embodying these statutes: *Willis* v. *duPont*, 76 F. Supp. 1010 (E. D. Okla.), pending on appeal (suit by 1688 claimants under Eight Hour Law and Bacon-Davis Act); *McDaniel* v. *Brown & Root, Inc.*, 7 W. H. Cases 978 (E. D. Okla.) pending on appeal (suit by 201 claimants under Eight Hour Law and Bacon-Davis Act); *Bumpus* v. *Remington Arms Co.*, 77 F. Supp. 94 (W. D. Mo.) (Exec. Order 9240); *Harrington* v. *Empire Construction Co.*, 71 F. Supp. 324 (D. Md.) (Exec. Order 9240); *Greenstein v. Pan American Airways Inc.*, 185 Misc. 429 (Sup. Ct. N. Y. County) (Walsh-Healey Act); cf. *Kelly* v. *Grimshaw*, 161 Kan. 253 (Bacon-Davis Act); *Adams* v. *Long*, 202 S.W. (2d) 112 (Mo. App.) (Exec. Order 9240).

Contra: *Deal & Co., Inc.* v. *Marlin*, 209 Ark. 967 (Eight Hour Law); *Moehl* v. *duPont*, 12 Labor Cases par. 63,545 (N. D. Ill.) (Exec. Order 9240); *Crabb* v. *Welden Bros.*, 65 F. Supp. 369 (S. D. Iowa), reversed on other ground, 164 F. 2d 797 (C. C. A. 8) (Exec. Order 9240).

There are a number of cases which have been dismissed because the individual claims were for less than $3000: *Crabb* v. *Welden Bros.*, 164 F. 2d 797 (C.C.A. 8) (Exec. Order 9240); *Kasper* v. *National Electric Products Corp.*, 165 F. 2d 431

Bacon-Davis, and Walsh-Healey Acts, was not amended by the recent Portal to Portal Pay Act. Moreover, the Portal Act in terms does not appear to reach the use of third party beneficiary theories even as to those statutes which the Act specifically amends.

1. *Extraterritoriality:* There is serious doubt whether Congress intended the Eight Hour Law to be given extraterritorial application. The decision below emphasized the fact that the law by its terms embraced "*Every contract* made to which the United States * * * is a party" (emphasis supplied by court below), and concluded that "Words of such inclusive reach cannot properly be read to exclude contracts for government jobs abroad" (R. 136). But, as stated by Mr. Justice Holmes, "all legislation is *prima facie* territorial." *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357; *Ex parte Blain*, 12 Ch. Div. 522, 528; *State* v.

(C.C.A. 3) (Exec. Order 9240); *Sweet* v. *B. F. Goodrich Co.*, 68 F. Supp. 782 (N. D. Ohio) (Exec. Order 9240); *McGuire* v. *Hercules Powder Co.*, 7 W. H. Cases 658 (E. D. Tenn.) (Exec. Order 9240); *Kuly* v. *White Motor Co.*, 11 Labor Cases Par. 63,434 (N. D. Ohio) (Exec. Order 9240).

The files of the Department of Justice, which are incomplete since the contractor in most of these cases is now represented by private counsel, show that the following cases based on the theory of a private right of action are pending: *Abbs* v. *Ford Motor Co.*, E.D. Mich. Civil No. 6880 (suit by over 6000 claimants under Bacon-Davis Act); *Anderson* v. *J-M Service Corp.*, D. Kansas No. 1671 (suit by over 5000 claimants under Eight Hour Law, Exec. Order 9240 and Walsh-Healey Act); *Cromer* v. *Hercules Powder Co.*, D. Kansas No. 6120 (suit under Walsh-Healey Act and Exec. Order 9240); *Assel* v. *Hercules Powder Co.*, D. Kansas No. 5995 (suit under Walsh-Healey Act and Exec. Order 9240).

Carter, 27 N. J. (3 Dutcher) 499. In addition, while it is a well settled principle of construction that the meaning of the legislature is to be determined, if possible, from the language of the act, it is equally well established that a statute should be construed with reference to the purpose to be accomplished and the mischief to be corrected. *United States* v. *Carbone*, 327 U. S. 633, 637-639, 642; *Chatwin* v. *United States*, 326 U. S. 455; *Smith* v. *Townsend*, 148 U. S. 490, 494; *Holy Trinity Church* v. *United States*, 143 U. S. 457. The purpose of Congress in enacting the Eight Hour Law was, we submit, to improve only domestic working conditions.[8] As the late Chief Justice Stone, when Attorney General of the United States, pointed out in answering the inquiry from the Secretary of State whether the Eight Hour Law applied to alien labor[9] employed in the construction of the American embassy in London (34 Op. A. G. 257, 259-260):

> The purpose of the statute under consideration [*i.e.* the Eight Hour Law] is for the im-

[8] There is no question here involved as to the power of Congress to prescribe hours of work and rate of compensation on government contracts regardless of where the work is performed. The sole question is whether Congress intended to exercise its full power. For that reason, the workmen compensation cases cited by the court below, which deal with the question of power (R. 137), are here irrelevant.

[9] Since the inquiry from the Secretary of State was whether the Law covered alien labor in a foreign country, the opinion of the Attorney General is likewise so phrased. There, however, is nothing in the rationale of the opinion or the Law itself to justify applying the Law extraterritorially to American citizens, while excluding aliens.

provement of labor conditions. Can there then be imputed to Congress the intent to better labor conditions in a foreign country or benefit alien laborers and mechanics employed outside the territorial jurisdiction of the United States, even when the enforcement of the statutory provision would disturb the agreements entered into between contractors and laborers and mechanics in a foreign country?

In the absence of express provisions in the statute plainly indicating the intent of Congress to apply the restrictions of the Act to the employment of alien labor on public works of the United States being performed in a foreign country, I do not think such intent can be imputed. * * *.[10]

---

[10] Attorney General Stone goes on to distinguish the earlier opinion of his predecessor (25 Op. A. G. 441), cited by the court below (R. 136). This earlier opinion upheld the application of the Eight Hour Law to public works of the United States within the Canal Zone in language suggesting that the Act might also be applicable in foreign countries. But at the time the work was to be performed, the United States, by treaty of the Republic of Panama had acquired "all the rights, power and authority within the zone mentioned * * * which the United States would possess and exercise if it were the sovereign of the territory * * * to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.". See 34 Op. A. G. at 261. Moreover, it is significant that Congress in appropriating additional monies for the construction of the Panama Canal in the Urgent Deficiencies Appropriation Act of 1906 (Act of February 27, 1906, c. 510, 34 Stat. 27, 33) expressly provided that the Eight Hour Law should not apply to alien laborers employed in the construction of the canal.

In answer to an inquiry from counsel for the respondent, an assistant solicitor of the Department of Labor advised respondent's counsel by letter that the conclusion he draws from the two Attorney Generals' opinions mentioned above "seems to be that the Eight-Hour Law is applicable to an American citizen working in a foreign country, provided the worker otherwise comes within the provisions of the Act".

And in 19 Comp. Gen. 576, both the Secretary of State and the Comptroller General indicated that the extraterritorial application of the Law might easily lead to serious difficulties in effecting contracts for necessary services in countries where social and business conditions and customs differ widely from our own. See also 29 Op. A.G. 488; cf. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; Mathews, *Labor Standards Provisions in Government Foreign Procurement Contracts*, 42 Ill. L. Rev. 141.

Moreover, the original Eight Hour Law was enacted in 1892 (Act of August 1, 1892, 27 Stat. 340), a time when Congressional policy with regard to bettering labor conditions was in its infancy as compared to the legislative attitude at the time of passage of the Bacon-Davis and Fair Labor Standards Acts. Yet the geographic scope of these later Acts is expressly restricted to the United States and its territories and possessions. See Bacon-Davis Act, 40 U.S.C. 276a; Section 3(c) of the Fair Labor Standards Act, 29 U.S.C. 203(c);[11] *Burns* v. *Metcalfe Const. Co.*, 69 F. Supp. 381 (W.D. Mo.); *Barnhard* v. *Metcalfe Const. Co.*, 64 F. Supp. 953 (D. Neb.); *Filardo* v. *Foley Bros., Inc.*, 181 Misc. 136 (Sup. Ct. N.Y. County).[12] Similarly the

[11] *Connell* v. *Vermilya-Brown Co.*, 164 F. 2d 924 (C.C.A. 2), certiorari granted, March 29, 1948, No. 608, this Term, cited below (R. 136), involves the question whether a Bermuda base held by the United States under a 99-year lease is such a territory or possession of the United States, and therefore is not relevant here.

[12] This *Filardo* v. *Foley* case involved a suit by respondent against petitioners herein for the same overtime compensation

Walsh-Healey Act (41 U.S.C. 35, *et seq.*) by regulation of the Secretary of Labor, issued pursuant to his power to grant exemptions from the Act (41 U.S.C. 40), does not cover contracts to be performed outside the geographic limits of the United States and its territories. Moreover, under Section 1(b) of the Miller Act (40 U.S.C. 270a(b)), contracting officers are authorized to waive, *inter alia*, the requirement of a payment bond, for so much of the work under the contract as is to be performed in a foreign country, despite the fact, which this Court has recognized, that these bonds are required for the protection of the contractor's employees. *MacEvoy Co.* v. *United States*, 322 U. S. 102, 104, and cases cited. All these statutes and regulations indicate that, even though the benevolent policy of the Government with regard to working conditions has been greatly developed and expanded, Congress has not yet made, but on the contrary has specifically declined to make, the extension which the court below finds by implication in the Eight Hour Law, the applicability of that policy to work performed in foreign countries.

The implementation of the Law by criminal sanctions and penalties is another factor which should be considered in determining whether the statute was to be applied extraterritorially. Section 322 of the Law (40 U.S.C. § 322) (Act of

---

as here involved. That suit was, however, brought under the Fair Labor Standards Act, and Judge Pecora ordered the complaint dismissed on the ground that the FLSA does not apply extraterritorially.

August 1, 1892, 27 Stat. 340) declares intentional violations to be misdemeanors, punishable by fine or imprisonment. The 1912 amendment (Act of June 19, 1912, 37 Stat. 137) adding civil sanctions (Section 324) expressly did not modify or limit the pre-existing statutory provisions and left the criminal sanctions as an integral part of the Law (see 39 Op. A.G. 418). In these circumstances, it was clearly improper for the court below to limit its consideration of the Law's coverage as if it imposed only civil liabilities (R. 136-137). When these criminal sanctions are considered, it would appear that the Law's geographic limits are defined by the traditional rule that criminal statutes are not to apply extraterritorially, even as to American citizens, unless a contrary intent appears. *Blackmer* v. *United States*, 284 U. S. 421, 437; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357. As already indicated, no such intent is here manifest.

2. *Statutory Right of Employees to Sue:* The court below recognized that prior to the 1940 amendment, the Eight Hour Law was in the nature of a mandatory direction from the Government to its agents; that it did not constitute a contract requiring payment for work in excess of eight hours a day, and hence that the Law gave to a worker no right to recover compensation for that work. *United States* v. *Martin*, 94 U. S. 400; *United States* v. *Moses*, 126 Fed. 58 (C.C.A. 9), certiorari denied, 195 U. S. 632; *Timmonds* v. *United States*,

84 Fed. 933 (C.C.A. 7); *Coleman* v. *United States*, 81 Fed. 824 (D. Ky). That court, however, went on to hold that the 1940 amendment made "it abundantly clear that the statute is now designed to do more than merely declare a desirable policy" (R. 136), and that in light of the Law's purpose, should be construed to bestow a right to sue upon employees within its coverage (R. 134-136). The position of the Department of the Army on this question is as follows:

Congress did not intend by the 1940 amendment to convert the Eight Hour Law from merely a mandatory directive to government agents and contractors supported by penal sanctions to a grant of a right of action to employees. The amendment is framed in terms of a suspension of the absolute bar previously imposed under the Eight Hour Law, upon the condition of payment of time and one-half for work in excess of eight hours per day. It was enacted at a time when the Nation's security was threatened, when the need for labor was acute, and is concerned only with the relaxation of the limitation on employment in excess of eight hours in order to make that labor available. The amendment does not change the nature of the Eight Hour Law as a policy directive running from the Government to its contractor. It merely varies the content of the mandate to meet pressing current needs, relaxing the absolute prohibition of the Law as it stood prior to 1940.

20 Comp. Gen. 233, 235-236; 21 Comp. Gen. 1110, 1112; 24 Comp. Gen. 376, 377; cf. *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, 949 (C.C.A. 6). Such a provision is no more than a Congressional instruction to its agents as to the terms and conditions under which the Government will contract and was not intended to create any rights in private individuals to enforce these instructions. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 129.[13]

Nor could such a drastic change of policy be based on the meager legislative history of the amendment. On June 28, 1940, about three months prior to the enactment of the amendment, Congress had provided for the suspension, during the period of national emergency, of the Eight Hour Law as applied to civilian employees of the War and Navy Departments and the Coast Guard "where additional employees cannot be obtained to meet the exigencies of the situation," and for the payment of one and a half times the regular rate for overtime work to these employees. Act of June 28, 1940, c. 440, Sec. 5(a), 54 Stat. 676, 678, 50 U. S. C. App. 1155(a). Section 5(b) of that statute suspended without more the Eight Hour Law as ap-

[13] The statutory provision here involved is very different from that involved in *United States* v. *Post*, 148 U. S. 124, on which the court below relied (R. 134). The statute there involved (Act of May 24, 1888, 25 Stat. 157) expressly stated that "If any letter-carrier is employed a greater number of hours per day than eight he *shall be paid extra* for the same in proportion to the salary now fixed by law." (Emphasis supplied).

plied to persons engaged in work covered by Army, Navy or Coast Guard contracts. It was to eliminate the confusion resulting from the limited coverage of Section 5(b) that the amendment to the Eight Hour Law here involved was enacted on September 9, 1940. It was added to H. R. 10263, 76th Cong., 3d Sess., which became the Second Supplemental National Defense Appropriation Act, 1941 (54 Stat. 872), by amendment offered from the Senate Floor by Senator McKellar. The amendment was accepted with practically no discussion. Senator Thomas did insert a statement explaining the amendment's purpose in the Record (86 Cong. Rec. 11216-11217).[14] As a result of Conference, the Managers on behalf of the House of Representatives initially recommended disagreement with the proposed amendment (H. Rep. 2916, 76th Cong., 3d Sess., p. 5), but when the question came up for discussion on the floor of the House, it was moved, and the House voted without discussion, to recede from its disagreement and concur in the Senate amendment. 86 Cong. Rec. 11569.

To change a law so long regarded as merely declaratory of public policy, and penal in its nature, into a statute affording to aggrieved employees

[14] Senator Thomas there stated that by the amendment "it is * * * * proposed that the rigid limitations of the existing 8-hour law of 1912 be modified by permitting work in excess of 8 hours per day but subject to the requirement that overtime work be compensated at not less than time and one-half the regular rate of pay."

a remedy by court action calls for a clearer expression of legislative purpose than has been here manifested by Congress. As already indicated, Congress imposed criminal sanctions for the intentional violation of the Eight Hour Law (40 U.S.C. 321). In addition, the contractor is subjected to civil sanctions in the form of a withholding of a $5 penalty for each violation of the Law, with an express provision for a remedy, administrative and judicial, whereby the contractor may recover improperly imposed penalties. The Law is silent as to any judicial and administrative machinery made available to employees, and we believe this silence to be significant. Where Congress has intended to provide a statutory procedure, administrative or judicial, whereby an employee was to receive compensation, it has experienced no difficulty in expressly doing so in the various statutes enacted within five years prior to the 1940 amendment. Under Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. 216(b), the employee himself may bring suit against his employer for the overtime compensation to which he is entitled under the Act. Under the Bacon-Davis Act, as amended by the Act of August 30, 1935, 49 Stat. 1011, 40 U.S.C. 276a, 276a-2, employees receive that compensation from the Comptroller General who is authorized to withhold the necessary monies and to pay it over to them; and if the payments withheld are insufficient to reim-

burse all the employees, the Act further provides that they may bring suit for the difference in the name of the United States to their own use against the contractor or his surety in accordance with the provisions of the Miller Act. The Walsh-Healey Act, 41 U.S.C. 36, provides for the withholding of monies due on contracts or recovery thereof for underpayments of wages through a suit brought in the name of the United States by the Attorney General, and for the payment of such monies, on order of the Secretary of Labor, over to the employees concerned.[15]

In this connection, the enactment of the recent Portal to Portal Pay Act, 61 Stat. 84, 29 U.S.C.A. 251, *et seq.*, is also significant. By this statute, Congress restricted the rights of employees to recover for claims in various situations arising under the Fair Labor Standards Act. The same restrictions were specifically extended to the Bacon-Davis and Walsh-Healey Acts in order to eliminate the possibility that claims of the type which Congress intended to ban might reappear by use of statutes other than the Fair Labor Standards Act. That no reference is made in the Portal Act to the Eight Hour Law affords a fair

[15] A memorandum submitted by the Solicitor of the Department of Labor to Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st sess., Hearings on proposed amendments of the Fair Labor Standards Act, pages 2719-2720, suggests that employees may have a right to sue under the Walsh-Healey Act and the Bacon-Davis Act, reviewing legislative statements in connection with the Portal-to-Portal Act which might lead to that conclusion.

basis for the assumption, that the latter statute was not deemed to have any connection with the question of employee suits.

3. Employee's right to sue as third party beneficiary: The holding below that respondent could recover as a third party beneficiary of the contract between petitioners and the Government is necessarily predicated on the inclusion in the contract of the requirements of the Eight Hour Law. The contract did not contain an Eight Hour Law provision, the specific inclusion of which is mandatory where the contract is administratively considered to be subject to the Law. See W. D. Procurement Regulation No. 346; Army Procurement Regulations, Paragraph 5-402.3; 18 Comp. Gen. 646; 20 Comp. Gen. 890; 21 Comp. Gen. 1110; 24 Comp. Gen. 376. Without regard to the administrative view here evidenced by the omission of such a specific provision, the court below read the Law into the contract on the basis of the customary general provision that petitioners "obey and abide by all applicable laws * * * of the United States."

Even assuming, *arguendo,* that this general provision suffices to import the Eight Hour Law into the contract, it does not necessarily follow that respondent here may sue as a third party beneficiary. That question, involving the construction of the contract between petitioner and the United States is, as the court below recognized

(R. 137), one of federal, rather than state, law.[16] *Caldarola* v. *Eckert*, 332 U. S. 155, 158; *United States* v. *Allegheny County*, 322 U. S. 174, 185; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366-367. And, as formulated by this Court, the federal rule as to third party beneficiaries appears to be that "before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit." *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U. S. 220, 230; *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303, 307-308; cf. Restatement Contracts § 145. Whether an Eight Hour Law provision in the contract is intended for the direct benefit of persons in the class of respondent depends on the purpose of that provision, which in turn relates back to the intent of the Eight Hour Law. The court below by carrying over its holding that the Law was intended for the benefit and protection of employees to this phase of the case had no difficulty in holding respondent a third party beneficiary (R. 137). But, if, as has been urged, *supra*, pp. 16-21, the Law was not intended to confer a direct benefit on employees, but rather constituted only a mandatory direction

---

[16] For this reason, the various New York cases cited below, including *Lawrence* v. *Fox*, 20 N. Y. 268, are relevant only in so far as they follow "principles of general contract law" (R. 137). They are irrelevant to the extent that they formulate state law.

to government agents and contractors, then, inasmuch as no direct benefit was intended for employees by virtue of a contractual provision embodying the Law, these persons, contrary to the view of the court below, did not have a right to sue as third party beneficiaries of such a provision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1948.

APPENDIX

The pertinent provisions of the Eight Hour Law, 40 U.S.C. 321 *et seq.* are as follows:

§ 321. Eight-hour day on public works; river and harbor dredging; longer hours unlawful.

The service and employment of all laborers and mechanics who are or may be employed by the Government of the United States or the District of Columbia, or by any contractor or subcontractor, upon a public work of the United States or of the District of Columbia, and of all persons who are or may be employed by the Government of the United States or the District of Columbia, or any contractor or subcontractor, to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, is limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics or of such persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to require or permit any such laborer or mechanic or any such person employed to perform serv-

ices similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to work more than eight hours in any calendar day, except in case of extraordinary emergency: *Provided*, That nothing in this section and section 322 of this title, shall apply or be construed to apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock-excavating machinery or tools, nor to persons engaged in construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable rivers of the United States. (Aug. 1, 1892, ch. 352, § 1, 27 Stat. 340; Mar. 3, 1913, ch. 106, 37 Stat. 726.)

§ 322. Violation of act punishable.

Any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon a public work of the United States or of the District of Columbia, or any person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, who shall intentionally violate any provision of section 321 of this title, shall be

deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed $1,000, or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof. Aug. 1, 1892, ch. 352, § 2, 27 Stat. 340; Mar. 3, 1913, ch. 106, 37 Stat. 726.)

* * * * *

§ 324. Public contracts to provide for eight-hour day; stipulation for penalty; inspectors to report violations; deduction of penalty; appeals; right of action in Court of Claims.

Every contract made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of $5 for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work; and any of-

ficer or person designated as inspector of the work to be performed under any such contract, or to aid in enforcing the fulfillment thereof, shall, upon observation or investigation, forthwith report to the proper officer of the United States, or of any Territory, or of the District of Columbia, all violations of the provisions of this section directed to be made in every such contract, together with the name of each laborer or mechanic who has been required or permitted to labor in violation of such stipulation and the day of such violation, and the amount of the penalties imposed according to the stipulation in any such contract shall be directed to be withheld for the use and benefit of the United States, the District of Columbia, or the Territory contracting by the officer or person whose duty it shall be to approve the payment of the moneys due under such contract, whether the violation of the provisions of such contract is by the contractor or any subcontractor. Any contractor or subcontractor aggrieved by the withholding of any penalty as hereinbefore provided shall have the right within six months thereafter to appeal to the head of the department making the contract on behalf of the United States or the Territory, and in the case of a contract made by the District of Columbia to the commissioners thereof, who shall have power to review the action imposing the penalty, and in all such appeals from such final order whereby a contractor or subcontractor may be aggrieved by the imposition of the penalty hereinbefore provided such contractor or sub-

contractor may within six months after decision by such head of a department or the Commissioners of the District of Columbia file a claim in the Court of Claims, which shall have jurisdiction to hear and decide the matter in like manner as in other cases before said court. (June 19, 1912, ch. 174, § 1, 37 Stat. 137.)

§ 325. Same; contracts excepted; work included; waiver in time of war; when penalty not to be imposed; eight-hour law not affected.

Nothing in section 324 of this title shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: *Provided,* That all classes of work which have been, or may be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section 324 of this title. The President, by Executive Order, may waive the

provisions and stipulations in this section and section 324 of this title as to any specific contract or contracts during time of war or at a time when war is imminent. No penalties shall be imposed for any violation of such provision in such contract due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or to property, or by other extraordinary event or condition on account of which the President shall subsequently declare the violation to have been excusable. Nothing in this section or section 324 of this title shall be construed to repeal or modify sections 321-323 of this title, or apply to contracts entered into under the provisions of appropriation Acts approved prior to June 19, 1912. (June 19, 1912, ch. 174, § 2, 37 Stat. 138.)

§ 325a. Same; computation of wages on basic day rate of eight hours; work in excess of day rate.

Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay.

(Sept. 9, 1940, 9 a.m., E.S.T., ch. 717, title III, § 303, 54 Stat. 884.)

§ 326. Suspension of eight-hour law in case of emergency; overtime pay.

In case of national emergency the President is authorized to suspend provisions of law prohibiting more than eight hours labor in any one day of persons engaged upon work covered by contracts with the United States; *Provided*, That the wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours work, with overtime rates to be paid for at not less than time and one-half for all hours work in excess of eight hours. (Mar. 4, 1917, ch. 180, 39 Stat. 1192.)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1948 791937 .50

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U. S.
FILED
NOV 24

No. 91

In the Supreme Court of the United States

OCTOBER TERM, 1953

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	6
Summary of argument	6
Argument	9
I. The eight hour law does not apply extraterritorially	12
A. General statutes are presumed not to operate extraterritorially	12
B. The legislative history of the eight hour law reveals an exclusively domestic policy and purpose	16
C. Congress has specifically declined to extend the geographical scope of more recent wage-hour laws *in pari materia*	20
D. The administrative construction of the Eight Hour Law strongly supports the conclusion that it is not intended to have extraterritorial application	23
E. Advisory opinions under the Eight Hour Law, taken together, do not support the view that the statute is of extraterritorial application	25
II. The Eight Hour Law does not confer statutory right to sue upon employees	32
III. Respondent has no independent standing to sue as third party beneficiary	42
Conclusion	48
Appendix A, Pertinent provisions of Eight Hour Law	49
Appendix B, Letter from Jack B. Tate, Acting Legal Adviser, State Department, to Attorney General, Nov. 8, 1948	55
Appendix C, Letter from B. F. Burdick, Chief of Office, The Panama Canal, to Attorney General, Nov. 10, 1948	57

CITATIONS

Cases:

Alaska Packers Association v. *Industrial Accident Commission of California*, 294 U. S. 532	15
Amalgamated Utilities Workers v. *Consolidated Edison Co.*, 309 U. S. 261	41

Cases—Continued

	Page
American Banana Co. v. *United Fruit Co.*, 213 U. S. 347	12, 13
Bernhard v. *Metcalfe Const. Co.*, 64 F. Supp. 953	21
Blackmer v. *United States*, 284 U. S. 421	12, 13
Bruce's Juices v. *American Can Co.*, 330 U. S. 743	40
Burns v. *Metcalfe Const. Co.*, 69 F. Supp. 381	21
Caldarola v. *Eckert*, 332 U. S. 155	44
Clearfield Trust Co. v. *United States*, 318 U. S. 363	44
Coleman v. *United States*, 81 Fed. 824	33
Connell v. *Vermilya-Brown Co.*, 164 F. 2d 924	25
Dur-ite Company v. *Industrial Commission*, 394 Ill. 338	13
Ellis v. *United States*, 206 U. S. 246	18
Federal Trade Commission v. *Klesner*, 280 U. S. 19	41
Filardo v. *Foley Bros., Inc.*, 181 Misc. 136	21
German Alliance Insurance Co. v. *Home Water Supply Co.*, 226 U. S. 220	44, 45
Globe Newspaper Co. v. *Walker*, 210 U. S. 356	41
Great Northern Ry. Co. v. *United States*, 315 U. S. 262	20
Greenstein v. *Pan American Airways, Inc.*, 185 Misc. 429	43
Industrial Commission v. *McCartin*, 330 U. S. 622	15
MacEvoy Co. v. *United States*, 322 U. S. 102	22
Moch Co. v. *Rensselaer Water Co.*, 247 N. Y. 160	45
National Bank v. *Grand Lodge*, 98 U. S. 123	44
Neilson v. *Rhine Shipping Co.*, 248 U. S. 205	13
Overnight Motor Co. v. *Missel*, 316 U. S. 572	37
Paine Lumber Co. v. *Neal*, 244 U. S. 459	40
Perkins v. *Lukens Steel Co.*, 310 U. S. 113	34
Prescott v. *Collins*, 263 App. Div. 690, appeal dismissed, 290 N. Y. 811	44
Robins Dry Dock & Repair Co. v. *Flint*, 275 U. S. 303	44
Sandberg v. *McDonald*, 248 U. S. 185	13
State v. *Lancashire Ins. Co.*, 66 Ark. 466	13
Swisher v. *United States*, 57 C. Cls. 123	33
Texas & New Orleans R. Co. v. *Brotherhood of Railway Clerks*, 281 U. S. 548	42
Texas & Pacific Ry. v. *Rigsby*, 241 U. S. 33	36, 46, 47
Thomas P. Nichols & Son v. *National City Bank*, 313 Mass. 421, certiorari denied, 320 U. S. 742	46
Tiger v. *Western Investment Co.*, 221 U. S. 286	20
Timmonds v. *United States*, 84 Fed. 933	33
United States v. *Allegheny County*, 322 U. S. 174	44
United States v. *Bowman*, 260 U. S. 94	14, 15
United States v. *Cooper Corp.*, 312 U. S. 600	40
United States v. *Flores*, 289 U. S. 137	14
United States v. *Hutcheson*, 312 U. S. 219	20
United States v. *Martin*, 94 U. S. 400	33
United States v. *Moses*, 126 Fed. 58, certiorari denied, 195 U. S. 632	33
United States v. *National Surety Corp.*, 309 U. S. 165	44, 45

Cases—Continued	Page
United States v. *Post*, 148 U. S. 124	34
Walling v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945	34
Wilder, D. R., Mfg. Co. v. *Corn Products Co.*, 236 U. S. 165	40, 41
Statutes:	
Act of June 25, 1868, 15 Stat. 77	16
Act of June 19, 1912, 37 Stat. 137 (40 U. S. C. 324)	14, 17
Act of March 3, 1913, 37 Stat. 726	18
Act of March 4, 1917, 39 Stat. 1192 (40 U. S. C. 326)	19
Bacon-Davis Act as amended by the Act of August 30, 1935, 49 Stat. 1011 (40 U. S. C. 276a)	9, 21, 39
Chinese Exclusion Act, Act of May 6, 1882, 22 Stat. 58	17
Contract Labor Act, Act of February 26, 1885, 23 Stat. 332	17
Copeland ("Kickback") Act, Act of June 13, 1934, 48 Stat. 948 (40 U. S. C. 276b)	22
Defense Bases Act, Act of August 16, 1941, 55 Stat. 622, as amended by the Act of December 2, 1942, 56 Stat. 1035,	
Sec. 1 (42 U. S. C. 1651)	23
Sec. 2 (42 U. S. C. 1652 (b))	32
Eight Hour Law, Act of August 1, 1892, 27 Stat. 340	16, 20, 32
Eight Hour Law, Act of August 1, 1892:	
27 Stat. 340, as amended (40 U. S. C. 321–326)	9
40 U. S. C. 321	16, 31, 32, 38, 49
40 U. S. C. 322	10, 14, 16, 50
40 U. S. C. 324	10, 14, 17, 18, 19, 23, 37, 43, 51
40 U. S. C. 325	14, 19, 52
40 U. S. C. 325a	10, 19, 54
40 U. S. C. 326	19, 54
Fair Labor Standards Act (29 U. S. C. 201 *et seq.*)	9
Sec. 3 (c)	21
Sec. 16 (b)	39
General Deficiencies Act of 1906, Act of June 30, 1906, 34 Stat. 669	29, 31
Miller Act (reenactment of the Heard Act, Act of August 13, 1894, 28 Stat. 278, as amended by the Act of February 24, 1905, 33 Stat. 811	22
Sec. 2 (b) (40 U. S. C. 270b (b))	22
Naval Appropriation Act of 1917, 39 Stat. 1168	19
Portal-to-Portal Pay Act, 61 Stat. 84 (29 U. S. C., Supp. I, 251, *et seq.*)	40
Second Supplemental National Defense Appropriation Act, Act of September 9, 1940, 54 Stat. 872, 884 (40 U. S. C. 325a)	10, 19, 33, 35
Walsh-Healey Act (41 U. S. C. 35, *et seq.*)	9, 21, 39
41 U. S. C. 35 (b)	21
41 U. S. C. 35 (e)	21
41 U. S. C. 38	21
War and Defense Contracts Act, Act of June 28, 1940, c. 440, Sec. 5, 54 Stat. 676, 678 (50 U. S. C. App. 1155)	19, 35

Miscellaneous:

	Page
Army Procurement Regulations, Paragraph 5–402.3	24, 43
41 C. F. R. 201.603, 41 U. S. C. App. 201.603	21
18 Comp. Gen. 337, 646	23
18 Comp. Gen. 646	43
19 Comp. Gen. 516	27
20 Comp. Gen. 233, 235–237	34, 37
20 Comp. Gen. 890	23, 43
21 Comp. Gen. 1110, 1112	23, 34, 43
24 Comp. Gen. 376, 377, 378	23, 34, 37, 43
78 Cong. Globe 335	16
23 Cong. Rec.: 5724	16
5724, 5725, 5728, 5732	16, 33
48 Cong. Rec.: 381, 385	17
394–395	17
393–394	18
54 Cong. Rec. 2586–2590, 3150–3151	19
86 Cong. Rec.:	
11216–11217	19, 36
11569	36
Executive Order No. 8623, December 31, 1940, Code of Fed. Reg. Cum. Supp. Tit. 3, p. 850	24
Executive Order 9240 (7 F. R. 7159, 7419)	9
7 F. R. 687, 40 U. S. C. App. § 2.1	22
H. R. 9061, 62d Cong., 2d sess	18
H. R. 10263, 76th Cong., 3d sess	35
H. Rep. 1267, 52d Cong., 1st sess	17
H. Rep. 2916, 76th Cong., 3d sess., p. 5	36
Mathews, *Labor Standards Provisions in Government Foreign Procurement Contracts*, 42 Ill. L. Rev. 141, 146–147	24, 27
Memorandum of Solicitor of Department of Labor to Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st sess., Hearings on proposed amendments of the Fair Labor Standards Act, pp. 2719–2720	39
25 Op. A. G. 441	25
26 Op. A. G. 30	17
29 Op. A. G. 488, 492	27, 33
34 Op. A. G. 257	26, 27, 28
39 Op. A. G. 418	14
Restatement, Contracts, §145	45
U. S. Standard Construction Contract Form No. 23, Revised April 3, 1942, 41 U. S. C. (1946 ed.) Appendix 12.23, pp. 4520, 4522	23, 43
W. D. Procurement Regulation No. 346	24, 43
2 Williston, Contracts (Rev. ed. 1936):	
§ 356A	44
§ 373	45

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 91

FOLEY BROS., INC. AND SPENCER, WHITE & PRENTIS, INC., PETITIONERS

v.

FRANK PAUL FILARDO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

BRIEF FOR PETITIONERS [1]

OPINIONS BELOW

The oral rulings of the Supreme Court of New York, New York County (R. 81, 84), are not reported. The opinion of the Appellate Division of the Supreme Court of the State of New York in the First Judicial Department (R. 129–131) is

[1] The Solicitor General is appearing on behalf of petitioners because, in accordance with the provisions of its contract with petitioners here involved, a wartime "cost-plus" contract, the Department of the Army will ultimately have to pay such judgments as may be here rendered against petitioners.

reported at 272 App. Div. 446. The opinion of the Court of Appeals of New York (R. 132–138) is reported at 297 N. Y. 217.

JURISDICTION

The judgment of the Court of Appeals of New York was entered on March 12, 1948 (R. 138–139). The jurisdiction of this Court was invoked under Section 237 (b) of the Judicial Code, now 28 U. S. C. 1257 (3). The petition for certiorari was filed on June 11, 1948, and granted on October 11, 1948.

QUESTIONS PRESENTED

1. Whether the Eight Hour Law is applicable in the performance of a contract between the United States and a private contractor for construction work in a foreign country.

2. Whether, assuming the applicability of the Eight Hour Law, employees of the Government's contractor have recourse to the courts to recover overtime compensation either (a) by reason of a cause of action arising under the statute or (b) as third party beneficiaries of a contractual provision requiring the contractor to comply with the laws of the United States.

STATUTES INVOLVED

The pertinent provisions of the Eight Hour Law (Act of August 1, 1892, 27 Stat. 340, as amended, 40 U. S. C. 321–326), are set out in Appendix A, *infra*, pp. 49–54.

STATEMENT

The undisputed facts follow:

On November 10, 1941, petitioners entered into a cost-plus contract with the United States whereby petitioners were to construct roads, buildings and bases in the Middle East (R. 4, 98). In the contract, petitioners agreed *inter alia* to "obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, all political subdivisions thereof, or any other duly constituted public authority wherein the work is done" (R. 98). In February, 1942, by a contract made in New York (R. 94), petitioners hired respondent, an American citizen, to work as a cook on these construction projects at the salary of $60 per week (R. 14, 87, 88). Respondent's contract of employment with petitioners required him to "devote all of his time and attention and give his best efforts and skill to the performance of such services in and about such projects as the Constructors may from time to time assign to him" (R. 89). The employment contract contained no other provision as to hours and no provision for overtime pay, but respondent's weekly salary was set pursuant to a formula which set his wages at 150% of 85% of the New York prevailing wage rates (R. 60).

Pursuant to his contract, respondent went to petitioners' projects in Iraq and Iran (R. 15, 82).

He worked a total of seventy-four weeks during 1942 and 1943, including the time of his transportation, for all of which he received an average weekly salary of $68.38 (R. 82).[2] During that time he frequently worked more than eight hours a day and requested that he be paid for the work performed in excess of eight hours a day, but his request was refused (R. 19–23, 94). Upon his return to the United States, respondent again requested payment for the work performed in excess of eight hours a day, which request was again rejected (R. 22, 95–96).

Respondent, thereafter, on July 29, 1943, brought this suit against petitioners in the Supreme Court of the State of New York, County of New York, under the Eight Hour Law to recover compensation for work in excess of eight hours a day allegedly due him thereunder[3] (R. 3, 4–5). Petitioners' answer, filed on January 6, 1944, denied that respondent was entitled to any recovery (R. 5, 6–7). A trial was had before a jury. During the course of the trial, petitioners moved to dismiss the complaint on the ground that the

[2] Respondent from time to time received various voluntary salary increases (R. 24).

[3] The complaint as amended set forth two causes of action. The first, an attempt to set aside the employment contract and recover in *quantum meruit* for the "reasonable value" of respondent's services, was subsequently dismissed on motion of the petitioners (R. 48, 75). Respondent took no appeal to the Appellate Division from this dismissal, and hence that issue is no longer in the case.

Eight Hour Law conferred no right of action on respondent to sue his employer for overtime pay (R. 48–52). The trial court denied the motion, holding that the Eight Hour Law "* * * applies beyond the limits of the United States. The plaintiff has a right to bring this action" (R. 75, 81). At the close of the trial, petitioners joined in respondent's motion for a directed verdict (R. 81). They thereafter requested the court to charge that there is no right of action for overtime conferred on respondent by the Eight Hour Law, and excepted to its refusal so to charge (R. 84). Petitioners also excepted to the court's charge that the Eight Hour Law conferred a right of action upon respondent for overtime pay (R. 84) and moved to set aside the verdict (R. 86). The jury found that respondent had worked for a total of 1172 hours overtime (R. 85), and that on the basis of one and one-half times his average rate of pay per hour, the sum of $2,496.36 was due him (R. 85). The court added interest in the amount of $650 and costs of $181.60, and entered judgment for $3,327.96 (R. 1, 12, 13).

Upon appeal to the Appellate Division, First Department, the judgment of the Supreme Court was reversed (R. 128). The court concluded, two judges dissenting, that neither the Eight Hour Law nor the 1940 amendment thereto conferred a right of action for overtime pay, and in view of this conclusion, did not pass on the other ques-

tions raised (R. 131). Appeal was taken by respondent to the Court of Appeals, which reversed the judgment of the Appellate Division (R. 132–138).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals of New York erred:

1. In holding that the Eight Hour Law is applicable in the performance of a contract between the United States and a private contractor for construction work in a foreign country.

2. In holding that the Eight Hour Law conferred a right upon respondent to sue petitioners for compensation for work in excess of eight hours a day.

3. In holding that respondent could maintain a suit against petitioners for compensation for work in excess of eight hours a day as a third party beneficiary of the contract between petitioners and the United States.

4. In reversing the judgment of the Appellate Division of the Supreme Court of New York.

SUMMARY OF ARGUMENT

I

The Eight Hour Law does not apply extraterritorially. The literal language would include contracts performed outside the United States. But it is well established that legislation is presumed to apply only within the territorial juris-

diction of the United States unless a contrary intent appears. This is particularly true as to criminal laws. The history and purpose of the Eight Hour Law do not rebut this presumption of normal legislative intent, but demonstrate that the Act was not intended to operate outside the United States. The aim of the series of statutes embodied in the Eight Hour Law was to deal with domestic problems. It is also significant that Congress has made it plain that other labor legislation does not apply extraterritorially; there is no reason why the Eight Hour Law should have a broader sweep.

The Eight Hour Law has been construed by the Government contracting agencies as not having extraterritorial application, and this interpretation is entitled to weight. The two opinions of the Attorney General dealing with the subject, read together, seem to leave open the precise question involved here, and cannot be said to support respondent's position.

II

It is the position of the Department of the Army that the Eight Hour Law does not confer a statutory right to sue upon employees not paid overtime.

Prior to the 1940 amendment the Eight Hour Law clearly did not afford any individual worker a right to recover compensation, but merely imposed civil and criminal penalties upon the con-

tractor. Its primary purpose was to benefit employment generally, not the persons who were already employed by the Government or on Government contracts. The 1940 amendment suspending the effect of the statute upon payment of time and a half for overtime did not change the basic purpose of the law so as to grant a right to the individual worker. No such purpose is expressed in the history of the amendment, which is not separate legislation but merely a suspension of the main statute. Where Congress has intended to provide a procedure whereby an employee is to receive compensation, it has experienced no difficulty in expressly doing so in other labor statutes enacted within the period prior to the passage of the 1940 amendment. The omission of any such provision from the amendment to the Eight Hour Law, together with the fact that the Law enumerates other sanctions, is a clear manifestation of legislative intent that no individual right of action was created.

III

The contract between the petitioner and the Government included a provision requiring petitioner to "obey and abide by all applicable laws * * * of the United States." Respondent cannot sue as third party beneficiary under this provision unless it was included in the statute for his direct benefit. This depends upon whether the Eight Hour Law itself was intended for the

benefit of the individual employees. If Congress meant them to have a statutory right, they can of course recover irrespective of their status as third party beneficiary. If the statute gave them no such right, it seems clear that the general requirement that the contractors obey all laws does not create greater rights than the laws themselves.

ARGUMENT

This case presents certain aspects of a widespread recent effort to develop and expand, through litigation in situations where the Fair Labor Standards Act, 29 U. S. C. 201 *et seq.*, is not applicable, employee rights under statutes embodying federal wage-hour policy as to Government construction and procurement.[4]

The statute here involved is the Eight Hour Law (40 U. S. C. 321–326, *infra*, pp. 49–54) which stems from the Congressional declaration of 1868 that eight hours should constitute a day's work for all laborers, workmen, and mechanics employed by or on behalf of the Government of the United States. By Congressional enactment in 1892 and 1912, the old law was strengthened by providing civil penalties of five dollars a day for its non-enforcement or

[4] The statutes (and executive order) under which this litigation has arisen are the Eight Hour Law (40 U. S. C. 321 *et seq.*), the Bacon-Davis Act (40 U. S. C. 276a *et seq.*), the Walsh-Healey Act (41 U. S. C. 35 *et seq.*), and Executive Order 9240 (7 F. R. 7159, 7419).

violation and by extending its provisions to employees of contractors doing Government work. In addition to the civil sanctions (40 U. S. C. 324), intentional violations are declared misdemeanors, punishable by fine or imprisonment (40 U. S. C. 322).

In September, 1940, with the great need for accelerating production for war purposes, Congress removed the absolute prohibition against contractors employing laborers and mechanics in excess of eight hours a day, and provided (54 Stat. 884, 40 U. S. C. 325a):

> Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay.

This amendment, however, unlike the Fair Labor Standards Act, conferred upon employees no express right to sue for recovery of overtime pay.

In sustaining respondent's claim herein, the court below has held the statute applicable to the performance of a contract between the United States and a private contractor for construction work in a foreign country, and has found an

implied statutory right in employees of the contractor to sue for and obtain money compensation for overtime.

We believe that the court below was in error in holding the statute applicable to transactions occurring outside the United States.

The question as to the right of employees to sue under the Eight Hour Law to recover overtime compensation is one upon which the lower courts are not in accord, and as to which a decision by this Court would clarify and facilitate the administration of government contracts. On this point there are conflicting governmental interests. The Government has an interest in effective law enforcement; allowing the employees to sue for the statutory overtime would add a sanction to the statute and tend to insure employer compliance. On the other hand, since the Government must pay any amounts due employees under cost plus contracts such as we have here, the Government's financial interest is the same as the employer's. It is the position of the Department of the Army, the contracting agency, that the employees have no right to sue.

We believe that this Court will desire the benefit of a complete presentation of the arguments on each side of this question. The contentions in support of the decision below will, of course, be presented by counsel for respondent. The Department of Justice has represented the Army below in this case, and is of the view that the

Army is entitled to have its position fully stated. Point II of this brief, therefore, will set forth the argument on behalf of the Department of the Army on this question.

I

THE EIGHT HOUR LAW DOES NOT APPLY EXTRATERRITORIALLY

A. GENERAL STATUTES ARE PRESUMED NOT TO OPERATE EXTRATERRITORIALLY

We agree with the court below that Congress possesses the power to prescribe hours of work and rates of compensation for work performed pursuant to contracts with the Federal Government whether or not the work is performed within the United States. Cf. *Blackmer* v. *United States,* 284 U. S. 421. The basic inquiry here is whether or not Congress intended to exercise its power extraterritorially, an inquiry not satisfied by the approach taken by the Court of Appeals.

The court below (R. 136) relied primarily on a literal reading of the language of the Eight Hour Law, which in terms applies to "every contract made to which the United States * * * is a party." But this is not decisive when the issue relates to the application of a statute beyond the territorial limits of the enacting sovereign. It is a well-established canon of construction that "all legislation is *prima facie* territorial." *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 357;

Sandberg v. *McDonald*, 248 U. S. 185; *Neilson* v. *Rhine Shipping Co.*, 248 U. S. 205. In *Blackmer* v. *United States*, *supra*, at 437, the Court stated that "The legislation of Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States * * *."

This is true even though the statute may contain general words such as "every", which literally would reach extraterritorial acts. In the *American Banana* case the Court said, in reference to the Sherman Act (213 U. S. at 357):

> * * * Words having universal scope, such as "Every contract in restraint of trade," "Every person who shall monopolize," etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch.

See also *State* v. *Lancashire Ins. Co.*, 66 Ark. 466, 476; *Dur-ite Company* v. *Industrial Commission*, 394 Ill. 338, 348.

This presumption that statutes are to be construed as limited to the national territory has especial weight in connection with laws dealing with industry and labor, since on those subjects Congress would ordinarily be concerned only with conditions within this country and its possessions, and not with conditions abroad. Explicit language would be necessary to manifest a contrary legislative design.

The fact that the Eight Hour Law is a criminal statute also is significant in this respect. For obvious reasons criminal laws are not construed as applicable extraterritorially unless a contrary intention plainly appears. In *United States* v. *Flores*, 289 U. S. 137, 155, this Court declared:

> It is true that the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extra-territorial effect. *United States* v. *Bowman*, 260 U. S. 94, 98; compare *Blackmer* v. *United States*, 284 U. S. 421.

As already noted, *supra*, p. 10, the Eight Hour Law declares intentional violations to be misdemeanors, punishable by fine and/or imprisonment[5] (40 U. S. C. 322). Had Congress intended this criminal statute to have extraterritorial application, it would have been "* * * * natural for Congress to say so in the statute, * * *." *United States* v. *Bowman*, 260 U. S. 94, 98; *United States* v. *Flores*, 289 U. S. 137, 155.

---

[5] The court below avoided the presumption against extraterritoriality which attaches to criminal statutes by arbitrarily confining itself to the civil aspects of the Eight Hour Law (R. 136–137). The criminal penalties provided by the Act of August 1, 1892, *supra*, have remained in full force and effect. The 1912 amendment (Act of June 19, 1912, 37 Stat. 137), in adding civil sanctions (40 U. S. C. 324), expressly did not repeal or modify the pre-existing statutory provisions and left the criminal penalties as an integral part of the law. 40 U. S. C. 325; see 39 Op. A. G. 418.

These principles of construction are recognized as aids to statutory interpretation only because they express the normal intention of a legislative body with respect to the territorial scope of its enactments. They are not absolute. The subject of a statute may be such as to manifest an intention that the law be applicable wherever the offense be committed, as in the case of frauds against the United States. Cf. *United States* v. *Bowman*, 260 U. S. 94, which involved a conspiracy hatched on an American vessel on the high seas to defraud the United States Emergency Fleet Corporation. And of course there may be other evidence, in the statute or in its purpose or legislative history, of an intent that the law be applied outside the international boundaries.

But neither the respondent nor the court below has referred to any factor or circumstance which shows that the normal presumption against extra-territorial application should not govern here.[6] On the contrary, as we shall show, consideration of the purpose and history of the Eight Hour Law

[6] The workmen's compensation cases relied upon by the court below (R. 137) are not in point. They involve questions of conflict of laws and full faith and credit, and the statutes concerned specifically provided for application to employees injured outside the state where the contract of employment was made. *Industrial Commission* v. *McCartin*, 330 U. S. 622; *Alaska Packers Association* v. *Industrial Accident Commission of California*, 294 U. S. 532. There is no problem of statutory construction, of course, when the statute is specific.

and its administrative construction will demonstrate clearly that the Act was not intended to operate outside the United States.

B. THE LEGISLATIVE HISTORY OF THE EIGHT HOUR LAW REVEALS AN EXCLUSIVELY DOMESTIC POLICY AND PURPOSE

The Eight Hour Law evolved from a statute, first enacted in 1868, which merely declared "That eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may be hereafter employed, by or on behalf of the government of the United States." Act of June 25, 1868, 15 Stat. 77. The legislative debates indicate that the evil to be corrected was the unemployment resulting from the decrease in ship construction at Government Navy Yards upon termination of the Civil War. It was thought that the statute would spread the available work. 78 Cong. Globe 335.

In 1892 the law was re-enacted (Act of August 1, 1892, 27 Stat. 340) to secure a practical enforcement of the prior act by extending its coverage to contractors (40 U. S. C. 321) and by the addition of criminal penalties (40 U. S. C. 322). It is apparent from the debates and the pertinent House Report that domestic unemployment of one million, and the influx of cheap foreign labor were of grave concern. 23 Cong. Rec. 5724. The comparatively high wages and bonuses paid union soldiers during the Civil War had encouraged im-

migration. The great post-Civil War boom in railroad construction resulted in the importation of cheap labor. Railroad company agents scoured Europe to entice immigrants to settle on the railroad land grants in the West. High tariffs led to the "contract labor system," which was followed by the "sweating system." Coupled with this increase in man-power, technological advances had increased output per man. H. Rep. 1267, 52 Cong., 1st sess. It was also urged in support of the bill that shorter hours of work would provide opportunity for physical recuperation and for social and intellectual improvement, but a primary purpose of Congress was to spread the available work. *Ibid;* 23 Cong. Rec. 5724, 5725, 5728, 5732. The Eight Hour Law of 1892 was merely one of a series of laws designed to accomplish this end; prior acts had attempted to reduce the supply of foreign labor. See Chinese Exclusion Act (Act of May 6, 1882, 22 Stat. 58); Contract Labor Act (Act of February 26, 1885, 23 Stat. 332).

Because the Act of 1892 had been construed (26 Op. A. G. 30) not to apply to work done on private property by contractors for the Government (e. g., private shipyards, manufacturers of armor plate), the act was amended in 1912, to cover *every* contract to which the United States, any Territory, or the District of Columbia is a party. Act of June 19, 1912, 37 Stat. 137, 40 U. S. C. 324; 48 Cong. Rec. 381, 385, 394–395. There is no indica-

tion that the word "every", here first utilized in the text of the Eight Hour Law, was intended to extend the geographical limits of the act, as held by the court below; the contrary is revealed by one passage in the debates. The proposed bill (H. R. 9061, 62d Cong., 2d sess.) required violations of the Eight Hour Law to be reported to the "proper officer." 40 U. S. C. 324. An amendment was offered to require that violations be reported to the District Attorney having jurisdiction in the place where the work was performed. It was rejected solely because the bill imposed civil penalties which were not within the scope of a District Attorney's duties. 48 Cong. Rec. 393–394. The debate on report *vel non* to local District Attorneys indicates clearly that Congress viewed the statute as applying solely within territory under the sovereignty of the United States.[7]

---

[7] The 1892 Act was again amended by the Act of March 3, 1913, 37 Stat. 726. This amendment extended the eight hour principle to persons employed "to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia." In 1907, the Supreme Court had ruled that dredge workers were seamen and not "laborers and mechanics" under the Eight Hour Law: *Ellis* v. *United States*, 206 U. S. 246. The language of the 1913 amendment, which was, of course, intended to be in consonance with the rest of the statute, strongly indicates that the Eight Hour Law was not intended to be for extraterritorial application. Cf. Mr. Justice Holmes' remark in *Ellis* v. *United States*, 206 U. S. at p. 259, "* * * the most natural meaning of 'of the United States' is belonging to the United States."

Because of the war emergency in 1917, Congress authorized the President to suspend the Eight Hour Law as to contractors, provided that overtime rates be paid for all hours of work in excess of eight hours. Act of March 4, 1917, 39 Stat. 1192, 40 U. S. C. 326. Here also, the problem faced by Congress was one of domestic employment conditions. Debates on this proposal, passed as a rider to the Naval Appropriation Act of 1917, 39 Stat. 1168, appear to have been confined to discussion of the shortage of labor in American shipyards. 54 Cong. Rec. 2586–2590, 3150–3151.

The War and Defense Contract Act (Act of June 28, 1940, 54 Stat. 676, 678) suspended the Eight Hour Law for the duration of the emergency as to persons engaged upon work covered by Army, Navy, and Coast Guard contracts. Because of confusion resulting to contractors engaged upon work for other agencies in addition to the Army and Navy, a rider was attached to the Second Supplemental National Defense Appropriation Act (Act of September 9, 1940, 54 Stat. 884, 40 U. S. C. 325a), which permitted daily hours of work in excess of eight upon payment of overtime for all contracts covered by 40 U. S. C. 324–325. This amendment was accepted with practically no discussion. 86 Cong. Rec. 11216–11217.

Thus, as shown by the analysis of the Eight Hour Law in its development from the Act of 1868

to its present form, the act was meant to deal solely with domestic economic problems. There is no suggestion of any Congressional purpose to extend the statute's scope to the performance of Government contracts in foreign countries. There is thus no basis for not giving effect to the normal presumption against extraterritorial coverage.

C. CONGRESS HAS SPECIFICALLY DECLINED TO EXTEND THE GEOGRAPHICAL SCOPE OF MORE RECENT WAGE-HOUR LAWS *IN PARI MATERIA*

It is settled that "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277; cf. *United States* v. *Hutcheson*, 312 U. S. 219. For when Congress, acting over a period of years, passes a series of statutes dealing with the same general subject matter, the acts are to be construed in their historic setting as segments of an integrated whole.

The original Eight Hour Law was enacted in 1892 (Act of August 1, 1892, 27 Stat. 340), a time when Congressional policy with regard to bettering labor conditions was in its infancy as compared to the legislative attitude at the time of the passage of the Bacon-Davis and Fair Labor Standards Acts. Yet, the geographic scope of these later statutes is expressly restricted to the United States and its territories and possessions.

See Bacon-Davis Act, 40 U. S. C. 276a; Section 3 (c) of the Fair Labor Standards Act, 29 U. S. C. 203 (c); *Burns* v. *Metcalfe Const. Co.*, 69 F. Supp. 381 (W. D. Mo.); *Bernhard* v. *Metcalfe Const. Co.*, 64 F. Supp. 953 (D. Neb.); *Filardo* v. *Foley Bros., Inc.*, 181 Misc. 136 (Sup. Ct. N. Y. County).[8] Similarly the Walsh-Healey Act (41 U. S. C. 35, *et seq.*) by regulation of the Secretary of Labor, issued pursuant to his power to grant exemptions from the Act (41 U. S. C. 40), excludes contracts to be performed outside the geographic limits of the United States and its territories.[9] 41 C. F. R. 201.603, 41 U. S. C.

---

[8] This *Filardo* v. *Foley* case involved a suit by respondent against petitioners herein for the same overtime compensation as here involved. That suit was, however, brought under the Fair Labor Standards Act, and Judge Pecora ordered the complaint dismissed on the ground that the Fair Labor Standards Act does not apply extraterritorially.

[9] A reading of the Act reveals that the regulation issued by the Secretary of Labor merely makes explicit the implicit limitation on the territorial coverage of the various sections. E. g., The Secretary of Labor is to determine as a minimum wage the prevailing wage of the locality (§ 35 (b)) (clearly the Congress did not intend to adopt the lower wage scales of foreign countries for American citizens); compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed is prima facie evidence of compliance with this subsection (§ 35 (e)); the Secretary of Labor is authorized to utilize, with the consent of the State, such State and local officers and employees as he finds necessary to assist in administration (§ 38); the Secretary of Labor is authorized to make investigations and prosecute any inquiry necessary to his functions in any part of the United States (§ 38).

Appendix 201.603. Moreover, under Section 2 (b) of the Miller Act (40 U. S. C. 270b (b)) suits instituted on payment bonds may be brought only in the United States District Court for the district in which the contract was to be performed;[10] this Court has recognized that these bonds are required for the protection of the contractor's employees. *MacEvoy Co.* v. *United States,* 322 U. S. 102, 104, and cases cited.

All these statutes[11] indicate that, even though the benevolent policy of the Government with regard to working conditions has been greatly developed and expanded, Congress has not yet made, but on the contrary has specifically declined to make, the extension which the court below finds by implication in the Eight Hour Law, the applicability of that policy to work performed in foreign countries. On the other hand, where Congress does intend welfare legislation to apply extraterritorially, it has not relied upon implications of general language but has explicitly provided for such application. Defense Bases Act, Act of

---

[10] The Miller Act is a reenactment of the Heard Act (Act of August 13, 1894, 28 Stat. 278), as amended by the Act of February 24, 1905, 33 Stat. 811.

[11] It should also be noted that although the Copeland ("Kickback") Act, Act of June 13, 1934, 48 Stat. 948, 40 U. S. C. 276b, does not specify the geographical limits of its application, by regulation of the Secretary of Labor the Act is applicable only within the United States, the District of Columbia and the Territories of Alaska and Hawaii. 7 F. R. 687, 40 U. S. C. App. §2.1.

August 16, 1941, 55 Stat. 622, as amended by the Act of December 2, 1942, 56 Stat. 1035, 42 U. S. C. 1651.

D. THE ADMINISTRATIVE CONSTRUCTION OF THE EIGHT HOUR LAW SUPPORTS THE CONCLUSION THAT IT IS NOT INTENDED TO HAVE EXTRATERRITORIAL APPLICATION

The need for engaging in foreign construction on a large scale under Government contract is of recent origin, and the administration of the Eight Hour Law, insofar as it touches on the problem of extraterritoriality, is of equally recent development. The information available clearly demonstrates that the Eight Hour Law has not been considered, by those in charge of foreign construction or procurement, as a Congressional requirement governing foreign contracting operations. Although Section 324 expressly requires an Eight Hour Law provision to be included in every Government contract,[12] it is significant that the Secretary of the Treasury has approved standard construction contract forms, containing an Eight Hour Law clause, which provide that the form will not be required for construction in foreign countries. U. S. Standard Form No. 23, Revised April 3, 1942, 41 U. S. C. (1946 ed.) Appendix 12.23, pp. 4520, 4522. In addition, the instant prime contract and other similar negotiated contracts did not include the standard Eight Hour Law

[12] See 18 Comp. Gen. 337, 646; 20 Comp. Gen. 890; 21 Comp. Gen. 1110; 24 Comp. Gen. 376.

clause required to be incorporated by W. D. Procurement Regulation No. 346; Army Procurement Regulations, Paragraph 5–402.3.[13]

None of the 900 foreign procurement contracts entered into by the Board of Economic Warfare included an Eight Hour Law provision.[14] Significantly, the Department of State, which until World War II was the only Government agency continuously engaged in substantial foreign construction, advises that it has not considered the inclusion of an Eight Hour Law clause legally necessary for construction to be performed in foreign countries. See Appendix B, *infra*, pp. 55–56.

Executive Order No. 8623, December 31, 1940, Code of Fed. Reg. Cum. Supp. Tit. 3, p. 850, cited by the court below (R. 136), suspended the Eight Hour Law as to laborers and mechanics employed directly by the Government at bases acquired from Great Britain. But there has been controversy as to whether these bases were "possessions" of the United States within the meaning of stat-

[13] The Department of the Army advises that none of the contracts for off-continent operations contained the Eight Hour Law clause. Illustrative contracts are as follows: W 1098 eng—1525, June 8, 1942 (Labrador and Buffin Island); W 1098 eng—1375, June 3, 1942 (Cuba); W 1098 eng—1350, April 24, 1942 (Bahamas); W 1098 eng—108, November 10, 1941 (North Africa and Palestine); W 1098 eng—2, August 2, 1941 (Greenland); W 258 eng—54, February 8, 1941 (Newfoundland); W 958 eng—50, February 4, 1941 (Bermuda).

[14] Mathews, *Labor Standards Provisions in Government Foreign Procurement Contracts*, 42 Ill. L. Rev. 141, 146–147.

utes not operating extraterritorially. See *Connell* v. *Vermilya-Brown Co.*, 164 F. 2d 924 (C. C. A. 2), now awaiting decision in this Court, No. 22. The Order excluding such possessions from the Eight Hour Law out of proper caution does not indicate that the President thought similar action necessary for territory unquestionably foreign. Any other conclusion would bring the conduct of the various agencies just referred to into conflict with the views of the President.

E. ADVISORY OPINIONS UNDER THE EIGHT HOUR LAW, TAKEN TOGETHER, DO NOT SUPPORT THE VIEW THAT THE STATUTE IS OF EXTRATERRITORIAL APPLICATION

Appellant's primary reliance in support of the claim that the Eight Hour Law has extraterritorial force is an opinion rendered by Attorney General Moody in 1905. 25 Op. Atty. Gen. 441. The question presented to Attorney General Moody was whether the Eight Hour Law, applied to laborers and mechanics—clearly including both American and alien—employed in the construction of the Panama Canal. Although the Canal Zone was subject to the sovereign authority of the United States, at that time Congress had not legislated for it, and the President, acting pursuant to general authority delegated to him, had directed that local laws should remain in force until superseded. *Id.* at 443. Since there were no local laws affecting the subject, Attorney General Moody

declared that, although the Canal Zone was within the sovereign jurisdiction of the United States, "the case stands, so far as the applicability of the act of 1892 is concerned, exactly as if the territory were beyond the legislative power of the United States" (p. 444). He then ruled that Congress had power to fix the hours of labor for Government agents and contractors outside the territory of the United States, that the literal words of the Eight Hour Law did so, and that there was nothing absurd in giving the law such a literal interpretation.

Attorney General Moody's opinion, however, has subsequently been limited and at least partly overruled in an opinion by Attorney General Stone in 1924. 34 Op. Atty. Gen. 257. The State Department had asked whether the Eight Hour Law applied to laborers and mechanics (who were English) engaged in altering the American Embassy in London. Attorney General Stone ruled that the act did not extend to such alien laborers, stating that (pp. 259–260):

> The language of the Acts of June 19, 1912, and August 1, 1892, supra, is broad enough to include public works of the United States situated outside of the territorial limits of the United States, provided it was the intent of Congress to do so. But the statute contains no provision, express or implied, which would indicate that it was the intent of Congress to apply its terms to laborers and mechanics of foreign coun-

tries, employed temporarily upon the public works of the United States situated within the territorial limits of a foreign country.

The purpose of the statute under consideration is for the improvement of labor conditions. Can there then be imputed to Congress the intent to better labor conditions in a foreign country or benefit alien laborers and mechanics employed outside the territorial jurisdiction of the United States, even when the enforcement of the statutory provision would disturb the agreements entered into between contractors and laborers and mechanics in a foreign country?

In the absence of express provisions in the statute plainly indicating the intent of Congress to apply the restrictions of the Act to the employment of alien labor on public works of the United States being performed in a foreign country, I do not think such intent can be imputed.[15]

Attorney General Stone then adverted to the prior opinion of Attorney General Moody. Although he concurred in the opinion expressed by Attorney General Moody that Congress may,

[15] To the same effect see 19 Comp. Gen. 516, in which both the Secretary of State and the Comptroller General indicated that the extraterritorial application of the law might easily lead to serious difficulties in effecting contracts in countries where social and business conditions and customs differ widely from our own. See also 29 Op. Atty. Gen. 488; cf. Mathews, *Labor Standards Provisions in Government Foreign Procurement Contracts*, 42 Ill. L. Rev. 141.

if it chooses, fix the hours of labor on the work of the United States wherever it is conducted, he observed, "* * * it must be remembered that the question under consideration by Attorney General Moody was the application of the Act of 1892 to laborers and mechanics upon the public works of the United States within the Canal Zone. At the time the work in question was being performed, the United States, by a treaty with the Republic of Panama, had acquired 'all the rights, power and authority within the zone mentioned * * * which the United States would possess and exercise if it were the sovereign of the territory * * * to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.'" (Pp. 260–261.)

Attorney General Stone went on to declare that (p. 261):

> While it is a well settled principle of construction that the meaning of the legislature is to be determined, if possible, from the language of the Act, yet it is equally well established that a statute should be construed with reference to the purpose to be accomplished and the mischief to be corrected.

He concluded that this principle of construction required that the Act not be given a literal interpretation with respect to extraterritorial coverage.

It is clear that Attorney General Stone's opinion partly overruled Attorney General Moody's, inasmuch as the latter had indicated that both alien and American workers under Government contracts in foreign countries were covered by the Eight Hour Law. Attorney General Stone's opinion, which related only to alien workers, leaves open the status of American employees. But since Attorney General Moody had not differentiated between aliens and Americans, we believe that his reasoning has to a large extent been undermined by the subsequent opinion, and that the authority of his ruling has thus been considerably decreased. And, as Attorney General Stone noted, the earlier opinion was in fact dealing with the Canal Zone, not with foreign countries, so that it is not strictly in point with respect to the latter despite its reasoning.

We have discussed these opinions at perhaps undue length because of respondent's heavy reliance upon Attorney General Moody's opinion. But whether Attorney General Moody's statements have been overruled or merely limited, or whether they were dicta except as applied to the Canal Zone, is obviously not of controlling importance.[16] His opinion is no more binding on the courts with respect to the construction of a

[16] It is to be noted that Attorney General Moody's opinion was promptly overturned by Congress when in 1906 it excluded the construction of the Panama Canal from the Eight Hour Law. 34 Stat. 669.

statute than is the opinion of the present Attorney General. Since Attorney General Stone's opinion undermines the reasoning of Attorney General Moody and leaves the present question open, we think it fair to say that whether the Act applies to American workers in foreign countries is not governed by any authoritative ruling of the Attorney General.

Respondent also relies on a letter furnished in response to his request by an assistant solicitor of the Department of Labor. This letter merely reviews the two Attorney Generals' opinions, and states that "the conclusion seems to be that the Eight-Hour Law is applicable to an American citizen working in a foreign country, provided that the worker otherwise comes within the provisions of the Act." The assistant solicitor gave no independent opinion on behalf of the Department of Labor. It should be noted, moreover, that the Department of Labor does not administer the Eight Hour Law.

Although the opinion of Attorney General Stone deals only with alien labor in a foreign country, because the inquiry from the Secretary of State was so phrased, there is nothing in the statute to justify an extraterritorial application to American citizens, while excluding aliens. Such a differentiation between Americans and aliens would have to be read into the language of the act.

On the contrary, an interpretation of the act which permits uniformity of treatment as to hours of work of American citizens and aliens engaged on foreign projects accords with the realities of working conditions in overseas construction. Respondent's interpretation would lead to discord and confusion, since it would require payment of overtime to Americans but not aliens working on the same project. Prior to the 1940 amendment that interpretation would have meant that contractors on public works in foreign countries would have been faced with the choice of operating on a work schedule comprising concurrent shifts of unequal hours, employing no American labor, or working native labor on an eight hour day also. This same dilemma would face the Government today as to its own employees under Section 321, the Eight Hour provision being suspended only "in case of extraordinary emergency." Congress has specifically recognized the need for uniformity of treatment as to hours of labor in overseas construction. In appropriating money for the construction of the Panama Canal in the General Deficiencies Act of 1906 (Act of June 30, 1906, 34 Stat. 669), it provided that the Eight Hour Law should not apply to foremen and superintendents [i. e., American laborers] as well as to unskilled alien laborers.[17] It is significant that where Congress intended labor legislation to apply to construction work in foreign countries, it has expressly included aliens and American citizens within the

[17] See Appendix C, *infra*, p. 57.

coverage of the benefits. Defense Bases Act of August 16, 1941, Sec. 2, 55 Stat. 622, 42 U. S. C. 1652 (b), making the workmen's compensation system embodied in the Longshoremen and Harbor Workers Act applicable to some extraterritorial contracts.

II

THE EIGHT HOUR LAW DOES NOT CONFER A STATUTORY RIGHT TO SUE UPON EMPLOYEES

The argument in support of the position of the Department of the Army on this point is as follows:

Prior to the 1940 amendment, the Eight Hour Law clearly did not afford any individual worker a right to recover compensation. It merely imposed civil and criminal penalties upon a contractor for requiring employees to work over eight hours a day. That the purpose of the law was not to benefit the individual employees is indicated by the following statement made by a sponsor of the legislation during the debates on the Act of 1892 (now 40 U. S. C. 321):

> *It never was the spirit of the eight-hour law to permit men to work ten hours and pay them for a day and quarter's time.* It was not intended as a great boon to those men who were so fortunate as to be in the Government service at the time. The spirit and intent of the law was, that if there is more work than can be done by a certain number of men in eight hours, that

> more men shall be employed, that thereby the enforced idle element shall be drawn into the ranks of industry, the result *a general benefit to all.* [Italics supplied.] [23 Cong. Rec. 5728; see 29 Op. A. G. 488, 492.]

The court below recognized that no employee would have had the right to compensation prior to the 1940 amendment, and this was clearly established by the earlier authorities. *United States* v. *Martin,* 94 U. S. 400; *United States* v. *Moses,* 126 Fed. 58 (C. C. A. 9), certiorari denied, 195 U. S. 632; *Timmonds v. United States,* 84 Fed. 933 (C. C. A. 7); *Coleman* v. *United States,* 81 Fed. 824 (D. Ky.); see *Swisher* v. *United States,* 57 C. Cls. 123.

The 1940 amendment, however, provided, as we have seen, that:

> work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay.

This amendment is framed in terms of a suspension of the absolute bar previously imposed under the Eight Hour Law, upon the condition of payment of time and one-half for work in excess of eight hours per day. Thus, it is merely permissive, as distinct from restrictive or prohibitive. It seems clear that Congress did not intend this amendment suspending the act con-

ditionally because of the war emergency to convert the law from a mandatory directive to Government agents and contractors (cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 129) supported by sanctions enforceable by the Government to a grant of a right of action to employees. The amendment was enacted at a time when the Nation's security was threatened, when the need for labor was acute, and is concerned only with the relaxation of the limitation on employment in excess of eight hours in order to make that labor available. It merely altered the content of the mandate to meet pressing current needs, relaxing the absolute prohibition of the Law as it stood prior to 1940. 20 Comp. Gen. 233, 235–236; 21 Comp. Gen. 1110, 1112; 24 Comp. Gen. 376, 377; cf. *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, 949 (C. C. A. 6). The amendment cannot be regarded as having changed the basic purpose of the Act to the protection of the individual worker, as distinct from the general benefit to be derived from spreading the work among as many persons as possible.[18]

[18] For this reason, *United States* v. *Post*, 148 U. S. 124, relied upon by the court below (R. 134), is irrelevant. The dispute in that case was between the Government and its employees under the Letter Carriers Act, 25 Stat. 157, and not between contractors and their employees. That Act was not a directive to Government agents as to the terms under which the Government would contract. It directly fixed the hours of work of the Government's own employees and specifically provided that they "shall be paid extra" for hours of work in excess of eight.

Nor could such a drastic change of policy be based on the meager legislative history of the amendment. On June 28, 1940, about three months prior to the enactment of the amendment, Congress had provided for the suspension, during the period of national emergency, of the Eight Hour Law as applied to civilian employees of the War and Navy Departments and the Coast Guard "where additional employees cannot be obtained to meet the exigencies of the situation," and for the payment of one and a half times the regular rate for overtime work to these employees. Act of June 28, 1940, c. 440, Sec. 5 (a), 54 Stat. 676, 678, 50 U. S. C. App. 1155 (a). Section 5 (b) of that statute suspended without more the Eight Hour Law as applied to persons engaged in work covered by Army, Navy or Coast Guard contracts. It was to eliminate the confusion resulting from the limited coverage of Section 5 (b) that the amendment to the Eight Hour Law here involved was enacted on September 9, 1940. It was added to H. R. 10263, 76th Cong., 3d Sess., which became the Second Supplemental National Defense Appropriation Act, 1941 (54 Stat. 872, 884), by amendment offered from the Senate Floor by Senator McKellar. The amendment was accepted with practically no discussion. Senator Thomas did insert a statement explaining the amendment's purpose in the Rec-

ord (86 Cong. Rec. 11216–11217).[19] As a result of Conference, the Managers on behalf of the House of Representatives initially recommended disagreement with the proposed amendment (H. Rep. 2916, 76th Cong., 3d Sess., p. 5), but when the question came up for discussion on the floor of the House, it was moved, and the House voted without discussion, to recede from its disagreement and concur in the Senate amendment. 86 Cong. Rec. 11569.

It is, of course, true that "where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law" (*Texas & Pacific Ry.* v. *Rigsby,* 241 U. S. 33, 39),[20] unless a contrary

[19] Senator Thomas there stated that by the amendment "it is * * * proposed that the rigid limitations of the existing 8-hour law of 1912 be modified by permitting work in excess of 8 hours per day but subject to the requirement that overtime work be compensated at not less than time and one-half the regular rate of pay."

[20] Although this canon of construction was approved in *Texas and Pacific Ry.* v. *Rigsby*, primary reliance in that case was placed on the language of the Safety Appliance Acts, which were in issue. The Court pointed out that the inference of a private right of action was rendered irresistible by the provision of Section 8 of the Act of 1893 (45 U. S. C. 7) that an employee injured by any car, etc., in use contrary to the Act shall not be deemed to have assumed the risk, and by the reservation of liability in Section 4 of the supplement of 1910 (45 U. S. C. 13) in any remedial action for the death or injury of any railroad employee.

legislative intention appears. The question here is whether the Eight Hour Law was enacted for the benefit of those individuals who were working for Government contractors. Clearly, before 1940 it was not. The main purpose was to benefit the public by reducing unemployment, to benefit the great mass of workers as a whole, not those who were presently employed by the contractors. The suspension of the absolute prohibition and the substitution of the overtime compensation requirement did not change the underlying purpose of the Act. The extra cost of overtime work still tended to spread the work among more persons by inducing the employer to avoid work over eight hours per day as much as possible. Cf. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 577–578. Only when additional employees could not be secured would the employer avail himself of the more expensive alternative.

The amendment does not stand on its own feet as separate legislation.[21] Any failure upon the part of the contractor to pay time and one-half for work in excess of eight hours daily is a vio-

[21] It is the opinion of the Comptroller General that the 1940 amendment would be subject to the escape clause of section 325, that no overtime payments would be required in case of emergency caused by fire, famine, or flood, or other extraordinary events, in order to avoid civil sanctions. 20 Comp. Gen. 233, 235–237. Furthermore, a clause inserted into a contract which provided merely that the contract is subject to the 1940 amendment would not be sufficient compliance with the requirements of the Eight Hour Law (40 U. S. C. 324). 24 Comp. Gen. 376, 378.

lation of the law as it previously stood and not of the 1940 amendment—a violation which relates to the hours worked and not to the wages paid. Accordingly the underlying purpose of the law still seems to be the general advantage to the community from spreading the work among more persons, not an intention to compensate individual workers for overtime.

To change a law so long regarded as merely declaratory of public policy, and penal in its nature, into a statute affording to aggrieved employees a remedy by court action calls for a clearer expression of legislative purpose than has been here manifested by Congress. As already indicated, Congress imposed criminal sanctions for the intentional violation of the Eight Hour Law (40 U. S. C. 321). In addition, the contractor is subjected to civil sanctions in the form of a withholding of a $5 penalty for each violation of the Law, with an express provision for a remedy, administrative and judicial, whereby the contractor may recover improperly imposed penalties. The Law is silent as to any judicial and administrative machinery made available to employees, and we believe this silence to be significant.

Where Congress has intended to provide a statutory procedure, administrative or judicial, whereby an employee was to receive compensation, it has experienced no difficulty in expressly doing so in the various statutes enacted within

five years prior to the 1940 amendment. Under Section 16 (b) of the Fair Labor Standards Act, 29 U. S. C. 216 (b), the employee himself may bring suit against his employer for the overtime compensation to which he is entitled under the Act. Under the Bacon-Davis Act, as amended by the Act of August 30, 1935, 49 Stat. 1011, 40 U. S. C. 276a, 276a–2, employees receive that compensation from the Comptroller General who is authorized to withhold the necessary monies and to pay it over to them; and if the payments withheld are insufficient to reimburse all the employees, the Act further provides that they may bring suit for the difference in the name of the United States to their own use against the contractor or his surety in accordance with the provisions of the Miller Act. The Walsh-Healey Act, 41 U. S. C. 36, provides for the withholding of monies due on contracts or recovery thereof for underpayments of wages through a suit brought in the name of the United States by the Attorney General, and for the payment of such monies, on order of the Secretary of Labor, over to the employees concerned.[22]

[22] A memorandum submitted by the Solicitor of the Department of Labor to Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st sess., Hearings on proposed amendments of the Fair Labor Standards Act, pages 2719–2720, suggests that employees may have a right to sue under the Walsh-Healey Act and the Bacon-Davis Act, reviewing legislative statements in connection with the Portal-to-Portal Act which might lead to that conclusion.

In this connection, the enactment of the recent Portal-to-Portal Pay Act, 61 Stat. 84, 29 U. S. C., Supp. I, 251, *et seq.*, is also significant. By this statute, Congress restricted the rights of employees to recover for claims in various situations arising under the Fair Labor Standards Act. The same restrictions were specifically extended to the Bacon-Davis and Walsh-Healey Acts in order to eliminate the possibility that claims of the type which Congress intended to ban might reappear by use of statutes other than the Fair Labor Standards Act. The absence of a reference in the Portal Act to the Eight Hour Law affords a fair basis for the assumption, that the latter statute was not deemed to have any connection with the question of employee suits.

Many cases hold that when a legislature creates new statutory rights, the remedies it provides to enforce those rights are exclusive, and no other remedies may be resorted to. The Eight Hour Law, like the Sherman Act, is such a statute. This Court has frequently held that "the Sherman Act * * * created new rights and remedies which are available only to those on whom they are conferred by the Act" (*United States* v. *Cooper Corp.*, 312 U. S. 600, 604). See to the same effect *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 755; *D. R. Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 174–175; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471. In the

Wilder case, the Court stated (236 U. S., at 174–175):

> It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes."

In the *Wilder* case the Court also attributed significance to the fact that the purpose of the Sherman Act was to "protect the whole public". *Ibid.*

The Court has similarly held that the National Labor Relations Act can only be enforced in the manner prescribed in the statute, and that private organizations injured by a violation have no standing to enforce the Act on their own account. *Amalgamated Utilities Workers* v. *Consolidated Edison Co.*, 309 U. S. 261. Similarly, Section 5 of the Federal Trade Commission Act was construed by the Court as not providing private persons with administrative remedies for private wrongs. *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25. This Court has also held that under the copyright law a person has no remedies other than those created by the statute. *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356.

The decisive factor, of course, is the intention of Congress, and it would seem to be the normal presumption that when Congress creates a duty and specifically sets forth several sanctions by which the statutory obligation is to be enforced, the prescribed methods of enforcement would seem to be the only ones which Congress contemplated. A different situation is presented where a right is created but no sanction provided for, as in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. In such circumstances it is necessary to permit a private suit for enforcement if the congressional purpose is to be effectuated.

But the Eight Hour Law seems clearly to fall in the same class as the Sherman Act, inasmuch as the statute itself contains several sanctions. If these are not regarded as sufficient to enforce compliance, the appropriate procedure is to ask Congress to amend the law, not to have the courts create a remedy which Congress did not think necessary.

III

RESPONDENT HAS NO INDEPENDENT STANDING TO SUE AS THIRD PARTY BENEFICIARY

The court below held that, apart from the Eight Hour Law itself, respondent was entitled to recover as third party beneficiary of the contract between the Government and petitioners. We submit that respondent has no right under the

contract unless he has a right under the statute—and if he has a right under the statute, he can recover irrespective of the contract.

The holding below that respondent could recover as a third party beneficiary of the contract between petitioners and the Government is necessarily predicated on the inclusion in the contract of the requirements of the Eight Hour Law. The contract did not contain an Eight Hour Law provision, the specific inclusion of which is mandatory where the contract is administratively considered to be subject to the Law.[23] 40 U. S. C. 324; see W. D. Procurement Regulation No. 346; Army Procurement Regulations, Paragraph 5–402.3; 18 Comp. Gen. 646; 20 Comp. Gen. 890; 21 Comp. Gen. 1110; 24 Comp. Gen. 376. Without regard to the contrary administrative view here evidenced by the omission of such a specific provision, the court below read the Law into the contract on the basis of the customary general provision that petitioners "obey and abide by all applicable laws * * * of the United States"[24] (R. 98).

Even assuming, *arguendo*, that this general provision suffices to import the Eight Hour Law into the contract, it does not necessarily follow

[23] See U. S. Standard Form No. 23 (Rev.) Art. 11, printed in 41 U. S. C. (1946 ed.), Appendix 12.23, p. 4520.

[24] Cf. *Greenstein* v. *Pan American Airways, Inc.*, 185 Misc. 429, 431–432 (Sup. Ct. N. Y.) wherein the court held "meaningless" an allegation that the defendant had contracted that it would comply "with all the statutes, rules and regulations of the United States, affecting the employment of labor."

that respondent here may sue as a third party beneficiary. That question, involving the construction of the contract between petitioner and the United States is, as the court below recognized (R. 137), one of federal, rather than state, law. *Caldarola* v. *Eckert,* 332 U. S. 155, 158; *United States* v. *Allegheny County,* 322 U. S. 174, 185; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 366–367. As formulated by this Court, the federal rule as to third party beneficiaries appears to be that "before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit." *German Alliance Insurance Co.* v. *Home Water Supply Co.,* 226 U. S. 220, 230; *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U. S. 303, 307–308; *National Bank* v. *Grand Lodge,* 98 U. S. 123; cf. *Prescott* v. *Collins,* 263 App. Div. 690, appeal dismissed, 290 N. Y. 811.[25]

"While all the activities of a government of course confer benefits on its citizens, frequently the benefits are incidental and unenforceable." *United States* v. *National Surety Corp.,* 309 U. S.

[25] This appears to be the general rule for the determination of a claimant's status as donee rather than as creditor beneficiary, the former type being involved in this case. See 2 Williston, *Contracts,* § 356A (Rev. Ed. 1936). The court below did not suggest any difference between Federal law, New York law, and the general common law, but assumed them to be the same. (R. 137).

165, 170. It is a general rule that contracts for public advantage are for the benefit of the community as a whole, not for the sole benefit of individual inhabitants. See 2 Williston, *Contracts*, § 373 (Rev. ed. 1936). As restated by the American Law Institute, "a promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so * * *." See *Restatement, Contracts*, § 145.[26] Thus, where a water company contracts to supply water to a municipality and the property of an inhabitant is destroyed by fire because of the failure of the company to supply water, it is the federal rule that there is no liability. *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U. S. 220; cf. *Moch Co.* v. *Rensselaer Water Co.*, 247 N. Y. 160. Similarly, a user of the mails was denied recovery of consequential damages resulting from misdelivery of mail in a suit on a postmaster's bond, of which the United States was obligee. *United States* v. *National Surety Corp.*, 309 U. S. 165;

[26] § 145 (a) imposes liability where the intent is manifest in the contract, in light of the circumstances surrounding its formation, that the promisor shall make compensation. The illustrations under § 145 (a) are cases of explicit promises to indemnify for damage.

cf. *Thomas P. Nichols & Son* v. *National City Bank*, 313 Mass. 421, certiorari denied, 320 U. S. 742 (F. D. I. C. contract).

It seems clear that the general catch-all agreement to abide by all applicable laws was meant only to insure protection of the public interest in obedience to law, not independently to benefit private individuals. It may well be that if any of the applicable laws accorded enforceable rights to individuals, the contractual provision can be regarded as recognizing such rights. But in that event the individual would possess the right apart from the contracts. The general reference to applicable laws obviously does not create greater rights than the laws themselves.

Even if we assume that the catch-all provision in the contract can be regarded as intended directly to aid persons who would be beneficiaries of the various statutes which petitioners were agreeing to obey, whether the provision was intended to benefit persons in the class of respondent would relate back to the intent of the Eight Hour Law. The court below, by carrying over its holding that the law was intended for the benefit and protection of employees to this phase of the case, had no difficulty in holding respondent a third party beneficiary. (R. 137). But if the law was intended for the benefit of the employees, they would have a right to sue under the statute without regard for the contract. See *Texas & Pacific Ry.* v.

Rigsby, 241 U. S. 33, 39, *supra*, p. 36. If, however, as argued in Point II, the law was not intended to confer a direct benefit on employees, but to benefit the public by spreading the work, then the employees could not be regarded as direct beneficiaries of the contractual provision embodying the law and would have no right to sue as third party beneficiaries. Since the test of benefit seems to be the same in determining whether the statute allows enforcement by private individuals and in determining whether an individual can sue as third party beneficiary, the latter issue is of no independent significance.

In conclusion it should be noted that this case differs from other third party beneficiary situations, in that there was a formal written contract between the petitioners and respondent. Respondent's contract of employment with petitioners required him "*to devote all of his time and attention* and give his best efforts and skill to the performance of such services in and about such projects as the Constructors may from time to time assign to him" (emphasis supplied) (R. 89). The employment contract did not contain any provision for overtime pay; respondent's weekly salary was set pursuant to a formula which set his wage at 150% of 85% of the New York prevailing wage rates (R. 60). The third party beneficiary doctrine would seem to have no application when a contract between the alleged promisor

and the third party fully details the rights and obligations of both parties.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

PHILIP B. PERLMAN,
Solicitor General.

H. GRAHAM MORRISON,
Assistant Attorney General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

SAMUEL D. SLADE,
BENJAMIN FORMAN,
Attorneys.

NOVEMBER 1948.

APPENDIX A

The pertinent provisions of the Eight Hour Law, 40 U. S. C. 321 *et seq.* are as follows:

§ 321. Eight-hour day on public works; river and harbor dredging; longer hours unlawful.

The service and employment of all laborers and mechanics who are or may be employed by the Government of the United States or the District of Columbia, or by any contractor or subcontractor, upon a public work of the United States or of the District of Columbia, and of all persons who are or may be, employed by the Government of the United States or the District of Columbia, or any contractor or subcontractor, to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, is limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics or of such persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to require or permit any such laborer or mechanic or any such

person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to work more than eight hours in any calendar day, except in case of extraordinary emergency: *Provided*, That nothing in this section and section 322 of this title, shall apply or be construed to apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock-excavating machinery or tools, nor to persons engaged in construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable rivers of the United States. (Aug. 1, 1892, ch. 352, § 1, 27 Stat. 340; Mar. 3, 1913, ch. 106, 37 Stat. 726.)

§ 322. Violation of act punishable.

Any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon a public work of the United States or of the District of Columbia, or any person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, who shall intentionally violate any provision of section 321 of this title, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed $1,000, or by imprisonment for not

more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof. (Aug. 1, 1892, ch. 352, § 2, 27 Stat. 340; Mar. 3, 1913, ch. 106, 37 Stat. 726.)

* * * * *

§ 324. Public contracts to provide for eight-hour day; stipulation for penalty; inspectors to report violations; deduction of penalty; appeals; right of action in Court of Claims.

Every contract made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of $5 for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work; and any officer or person designated as inspector of the work to be performed under any such contract, or to aid in enforcing the fulfillment thereof, shall, upon observation or investigation, forthwith report to the proper officer of the United States, or of any Territory, or of the District of Columbia, all violations of the provisions of this section directed to be

made in every such contract, together with the name of each laborer or mechanic who has been required or permitted to labor in violation of such stipulation and the day of such violation, and the amount of the penalties imposed according to the stipulation in any such contract shall be directed to be withheld for the use and benefit of the United States, the District of Columbia, or the Territory contracting by the officer or person whose duty it shall be to approve the payment of the moneys due under such contract, whether the violation of the provisions of such contract is by the contractor or any subcontractor. Any contractor or subcontractor aggrieved by the withholding of any penalty as hereinbefore provided shall have the right within six months thereafter to appeal to the head of the department making the contract on behalf of the United States or the Territory, and in the case of a contract made by the District of Columbia to the commissioners thereof, who shall have power to review the action imposing the penalty, and in all such appeals from such final order whereby a contractor or subcontractor may be aggrieved by the imposition of the penalty hereinbefore provided such contractor or subcontractor may within six months after decision by such head of a department or the Commissioners of the District of Columbia file a claim in the Court of Claims, which shall have jurisdiction to hear and decide the matter in like manner as in other cases before said court. (June 19, 1912, ch. 174, § 1, 37 Stat. 137.)

§ 325. Same; contracts excepted; work included; waiver in time of war; when pen-

alty not to be imposed; eight-hour law not affected.

Nothing in section 324 of this title shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: *Provided,* That all classes of work which have been, or may be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisons of section 324 of this title. The President, by Executive Order, may waive the provisions and stipulations in this section and section 324 of this title as to any specific contract or contracts during time of war or at a time when war is imminent. No penalties shall be imposed for any violation of such provision in such contract due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or to property, or by other extraordinary event or condition on account of which the President shall subsequently declare the volation to have been excusable. Nothing in this section of section 324 of this title shall be construed

to repeal or modify sections 321–323 of this title, or apply to contracts entered into under the provisions of appropriation Acts approved prior to June 19, 1912. (June 19, 1912, ch. 174, § 2, 37 Stat. 138.)

§ 325a. Same; computation of wages on basic day rate of eight hours; work in excess of day rate.

Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. (Sept. 9, 1940, 9 a. nf., E. S. T., ch. 717, title III, § 303, 54 Stat. 884.)

§ 326. Suspension of eight-hour law in case of emergency; overtime pay.

In case of national emergency the President is authorized to suspend provisions of law prohibiting more than eight hours labor in any one day of persons engaged upon work covered by contracts with the United States: *Provided,* That the wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours work, with overtime rates to be paid for at not less than time and one-half for all hours worked in excess of eight hours. (Mar. 4, 1917, ch. 180, 39 Stat. 1192.)

APPENDIX B

"DEPARTMENT OF STATE

"Washington

NOVEMBER 8, 1948.

"In reply refer to
L: L/A: 811.5041/
11-348

"MY DEAR MR. ATTORNEY GENERAL:

"Reference is made to the letter from Mr. H. G. Morison, Assistant Attorney General, of November 3, 1948 (File HGM: BF), requesting a formal statement by the Department regarding its administrative practice with respect to including provisions of the Eight Hour Law in construction contracts to be performed in foreign countries.

"The Act of June 19, 1912, 37 Stat. 137, referred to as the Eight Hour Law, which requires in section 1 that every contract entered into by the United States involving the employment of laborers or mechanics shall contain a provision that no laborer or mechanic shall be required or permitted to work more than eight hours in any one calendar day upon such work, has not been construed as being applicable in foreign countries.

"While the law itself is sufficiently broad to embrace contracts executed by the United States for work to be done in foreign countries, the Comptroller General has held in 19 C. G. 516 that this statute need not be interpreted strictly according to the letter of the law when to do so

would contravene the intent of Congress by not taking into consideration its evident spirit and intent.

"In this connection your attention is invited to section 3 of the Act of May 7, 1926, 44 Stat. 404, 22 U. S. C. 294, which provides that the contracts for all work of construction, alteration, and repair under sections of the Foreign Service Buildings Act are authorized to be negotiated, the terms of the contracts to be prescribed without regard to such statutory provisions as relate to the negotiation, making, and performance of contracts and performance of work in the United States.

"Accordingly, the Department does not consider it legally necessary to include provisions of the Eight Hour Law in contracts to be performed in foreign countries but feels on the other hand that such contracts are governed by local law. The Eight Hour Law was enacted for the purpose of insuring certain benefits to workmen and it does not appear that Congress intended to legislate in the interest of foreign laborers or mechanics.

"Sincerely yours,

"For the Acting Secretary of State:

"S/ Jack B. Tate

"JACK B. TATE

"*Acting Legal Adviser.*

"The Honorable

"TOM C. CLARK,

"ATTORNEY GENERAL."

APPENDIX C

"THE PANAMA CANAL

"WASHINGTON OFFICE

"Washington

"NOVEMBER 10, 1948.

"The Honorable
"The Attorney General
"Washington, D. C.

"SIR:

"Reference is made to your inquiry concerning the nationality of the 'foremen and superintendents' of unskilled alien laborers, employed in the construction of the Isthmian Canal within the Canal Zone, who were removed from the application of the eight-hour law by section 4 of the Act of June 30, 1906, 34 Stat. 669.

"This question was referred to the Governor of The Panama Canal who has advised that the foremen and superintendents referred to in the statute were United States citizens, except possibly in a very few cases.

"Sincerely yours,

"S/ B. F. Burdick
"B. F. BURDICK
"Chief of Office."

U. S. GOVERNMENT PRINTING OFFICE 1948

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
AUG 2 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1947.

No. 91. **91**

FOLEY BROTHERS INC. & SPENCER, WHITE & PRENTIS, INC.,

Petitioners,

vs.

FRANK PAUL FILARDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

Brief for Frank Paul Filardo, in Opposition.

CHESTER A. LESSLER,
Attorney for Respondent.

HOWARD HENIG,
Of Counsel.

LOEBER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth 2-0689

INDEX.

	PAGE
Opinions Below	1
Jurisdictional Statement	1
Questions Presented	2
Statutes Involved	3
Statement	3
Argument	4
Conclusion	11

CASES CITED.

Abounader v. Strohmeyer & Arpe Co., 243 N. Y. 458, 465	8
Alaska Packers Assn. v. Industrial Accident Comm., 294 U. S. 532, 542-543	6
Atchison, T. & S. v. Railroad Commission of State of California, 283 U. S. 380	9
Austin v. City of New York, 258 N. Y. 113	9
Bruce's Juices v. American Can Co., 330 U. S. 743, 751	8
City of Phoenix v. Drinkwater, 46 Ariz. 470	9
D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U. S. 447, 456-458	8
German Alliance Insurance Co. v. Home Water Co., 226 U. S. 220, 230	9
Industrial Comm. v. McCartin, 330 U. S. 622, 626	6

PAGE

Lawrence v. Fox, 20 N. Y. 268 9
Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333 6
McNulty v. City of New York, 238 N. Y. 29 9
Matter of Post v. Burger & Gohlke, 216 N. Y. 544, 549 6
Robins Dry Dock and Repair Co. v. Flint, 275 U. S. 303, 307 9
Scott v. Platt, 137 P. 2nd 975 9
Seaver v. Ransom, 224 N. Y. 233 9
The United States v. Post, 148 U. S. 124 7
Veader v. Bay State Dredging, 17 Law Weekly 2020 10
Williams v. Kaiser, 323 U. S. 471 9

STATUTES AND AUTHORITIES CITED.

U. S. C., Title 40, Sections 324, 325A and 326 ..... 3, 7
25 Op. A. G. p. 441 ..... 5, 6
34 Op. A. G. 257 ..... 5, 10
25 U. S. Stat. 157, Ch. 308 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

FOLEY BROTHERS INC. & SPENCER WHITE & PRENTIS, INC.,
Petitioners,

vs.

FRANK PAUL FILARDO,
Respondent.

No. 91.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

Brief for Frank Paul Filardo, in Opposition.

Opinions Below.

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 129-131) is reported at 272 A. D. 446. The opinion of the Court of Appeals of New York (R. 132-138) is reported at 297 N. Y. 217.

Jurisdictional Statement.

The judgment of the Court of Appeals was signed on March 11, 1948 (R. 132). The jurisdiction of this Court is invoked under the act of February 13, 1925.

The respondent brought suit in the Supreme Court of New York County, to recover for overtime compensation

for work performed as cook in the building of certain publi works in Iraq and Iran, pursuant to petitioner's contract with the United States, under the Eight Hour Law as amended, for time and a half for all hours worked over eight hours per day (R. 4 and 5). Petitioners' answer denied recovery (R. 6 and 7). The respondent recovered a verdict from the jury on the questions of fact, to wit, the hours worked overtime (R. 85), and a motion to set aside the verdict on questions of fact and law was denied by the Trial Court (R. 86). The motions to dismiss solely on questions of law were denied prior to submission of the case to the jury (R. 81). The petitioners appealed to the Appellate Division, First Department, and raised the same questions of law as raised at the trial, and the Appellate Division reversed judgment of the Trial Term by a three to two decision, solely on the questions of law involved (R. 129-131). Respondent then appealed to the Court of Appeals, State of New York, and the same questions of law were briefed and argued, and the Court of Appeals of the State of New York unanimously reversed the Appellate Division, First Department on all questions of law raised and sent the case back to the Appellate Division, First Department to rule on all questions of fact remaining, if any (R. 137-138). The Appellate Division, First Department then entered an order confirming the finding of facts in the Court below and reinstated the judgment of said Trial Court and making the order of the Court of Appeals the order of the Appellate Division (R. 140).

Questions Presented.

1. Whether the Eight Hour Law, and particularly Sections 324 and 325A, Title 40, U. S. C. has extra-territorial effect outside of the United States, and if this question is answered in the affirmative, then,

2. Whether an employee has a right of action to recover his just overtime pay, either (a) Under the statute, or (b) As a third party beneficiary by reason of the contractual provisions in the contract between the petitioner herein and the United States.

All of these questions were ruled upon by the Court of Appeals and were answered unanimously in the affirmative (R. 132-138).

Statutes Involved.

The statutes involved and to be construed are Sections 324, 325A and 326 of Title 40 of the U. S. C.

Statement.

The facts in this case are not in issue and are therefore undisputed. The respondent, an American Citizen, was a cook and employed in the City of New York, by the petitioners, to work on public projects in Iraq and Iran, in which the petitioners were engaged, in accordance with a contract had with the War Department of the United States Government, during the year 1942 (R. 44, 87, 88). Pursuant to the terms of the employment, respondent was transported from New York to Iraq, arriving there in March 1942, and thereafter was assigned as cook to a camp at Ahwaz, Iran, and in May 1942, when he found out he was not receiving overtime pay for hours worked in excess of eight hours a day, he protested and made a demand for the same, which was disapproved (R. 18, 19). Respondent then was assigned to a camp in Iran and worked there from June 1942 to December 31, 1942, and upon returning to the base in March, filed another claim for overtime (R. 22) and another in New York when he arrived in June (R. 23, 95, 96). Respondent's testimony as to overtime was supported by the assistant foreman of the camp (R. 37-40). At the close of the case, the peti-

tioner moved to dismiss on all the grounds raised herein and on the additional ground that the respondent was not a laborer in the meaning of the Eight Hour Law. Said motions were denied, and the jury awarded a verdict to the respondent in the sum of $2,496.36, for overtime pay, on the basis of 1,172 hours overtime (R. 85).

The third party beneficiary doctrine is involved because the contract that the petitioners had with the United States contained the following clause, that the defendant agreed to "abide by all applicable laws, regulations, ordinances and other rules of the United States of America of the States, territory, all political subdivisions thereof, or any other duly constituted public authority wherein the work is done" (R. 98).

Argument.

It is respondent's contention that the writ should not be granted, as the decision below is eminently correct and sound in accordance with previous decisions of this Court and other jurisdictions; and further on the ground that if this Court is of the opinion that the Eight Hour Law is applicable extra-territorially, then the judgment of the Court below cannot be disturbed as respondent was granted judgment in any event on the third party beneficiary theory. This being a question of local law is not reviewable under the Rules of this Court. However, since the petitioner raises these three points again, an answer on the merits will be made to each.

1. *Extra-territoriality*: That the Eight Hour Law has extra-territorial effect is reasoned from the wording of the act itself and upon the previous decisions of competent authority. There is no question that Congress has the power to prescribe rates of pay wherever work is performed on public contracts, and this is admitted by the petitioner (footnote, p. 12 of Petitioners' Brief). The act under consideration states as follows:

> "*Every* contract made to which the U. S. • • • is a party and every such contract made for or on behalf of the U. S." (Sec. 324). (Italics ours.)

This clearly embraces all contracts made within or without the United States. In fact, the Court below in its opinion stated:

> "Words of such inclusive reach cannot properly be read to exclude contracts for government jobs abroad" (R. 136).

Furthermore, the opinion of the Attorney General in *25 Op. A. G. p. 441*, directly passed upon this question concerning American employees with respect to such laborer and mechanic, and held the Eight Hour Law to have extra-territorial effect. The attempt of petitioners to differentiate the facts of that case and to suggest that the Republic of Panama (where the work was performed) was similar to a possession of the United States and not a foreign territory, is not borne out by the opinion which states in so many words:

> "The case stands so far as the applicability of the act of 1892 is concerned (the 'Eight Hour Law' in existence at that time), exactly as if the territory were beyond the legislative powers of the U. S." (Parentheses ours.) (p. 444.)

Furthermore, the Department of Labor, in a letter dated October 16, 1946, in response to an inquiry, answered the question in the affirmative, to wit, that the Eight Hour Law is applicable to an American Citizen working in a foreign country.

The petitioner in support of its contention cites the opinion of the Attorney General in *34 Op. A. G. 257*, which holds that alien laborers working on Public Contracts

outside of the United States are not covered by the Eight Hour Law. This opinion is in no way contradictory to that of Attorney General Moody in 25 Op. A. G. 441, and moreover said opinion cites with approval the opinion of Attorney General Moody limiting it to American citizens working on Public Contracts outside of the United States. The attempt therefore, of the petitioner in its brief to give the impression that Attorney-General Stone decided contrary to the previous opinion, is not borne out by the reading of the opinions. Also *Matter of Post* v. *Burger & Gohlke*, 216 N. Y. 544, 549; *Industrial Comm.* v. *McCartin*, 330 U. S. 622, 626; *Alaska Packers Assn.* v. *Industrial Accident Comm.*, 294 U. S. 532, 542-543; cf. *Levy* v. *Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333.

The case of the *American Banana Company* v. *The United Fruit Company*, cited by petitioners, in support of its contention, is not in point, in that the facts in that case were that the Sovereign State of Costa Rica had violated the Sherman Anti-Trust Law, by acts performed by it in Costa Rica, thereby causing damage to plaintiff. This Court held that as between two sovereign states, to wit, State of Costa Rica and the United States, matters such as these must be handled through diplomacy. In the case at bar, the acts complained of are performed by citizens of the United States, over whom Congress has full authority to legislate. The references by petitioners to the Bacon-Davis Act, The Fair Labor Standards Act and the Walsh-Healey Act, on the contrary, support the finding of the Court below, as these acts contained specific restrictions as to where and how the Acts are applicable geographically, which restrictions are totally absent in the Act in question.

2. *Right of Employee to Sue Under the Statute*: The history of the Eight Hour Law, as cited by the Court below, is that the first statute was enacted in 1868 and then

re-enacted in 1892, which acts merely specified the maximum amount of hours to be worked a day on public works and provided for penalties and criminal sanctions in the event of violation. Amendments were supplied in 1912 which appear today as Sections 324-325 of Title 40 of the U. S. C. In 1917, Congress passed a law suspending the operation of the eight hour limit, as a war measure, provided that time and a half would be paid for overtime, and prior to the outbreak of the recent World War this latter provision was continued in Section 326. Thereafter and in 1940, Section 325A was enacted which suspended Section 326, and is the present statute to be construed (R. 133). This new provision again provided that all work in excess of eight hours per day on public works be permitted upon compensation of time and a half for the overtime.

The cases cited by the petitioner, to wit: *United States* v. *Martin*, *U. S.* v. *Moses*, *Timmonds* v. *The U. S.*, *Coleman* v. *U. S.*, were all cases decided prior to 1917, that is prior to the time that a basic rate of pay for overtime work was provided for laborers and mechanics under the statute, and a reading of those cases will show that the decisions in all those cases denying the right of an employee to sue under the statute was based upon the specific holding that there was no provision in the Eight Hour Law, as to the rate of pay for overtime. In fact it was this reasoning of this Court in the case of *The United States* v. *Post*, 148 U. S. 124, which led this Court to hold that the Letter Carrier's Act of 1888, which provided for a rate of overtime to be paid to postal employees, was the distinguishing feature in permitting postal employees to recover time and a half under the Eight Hour Law and the Court below so stated in its opinion, when it said "So read the statute differs little from the Letter Carriers Act (25 U. S. Stat. 157; Ch. 308), which has been interpreted to bestow a right to sue upon employees within its coverage (see *U. S.* v. *Post*, 148 U. S. 124)".

Furthermore, on this point, the Court below states as follows:

> "While the statute does not in so many words grant to the employee a cause of action if such compensation is not received, it is settled that such remedial legislation is to be given a liberal construction to effectuate its purpose and aim. (See *National Labor Relations Bd.* v. *Hearst Publications*, 322 U. S. 111, 129; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 259-260; *Warner* v. *Goltra*, 293 U. S. 155, 158; *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945.)" (R. 134.)

Moreover, the statute itself provides that overtime work is to be permitted upon "compensation" and the Court further went on to say that this was manifestly an affirmative direction, that overtime work shall be paid and collected in excess of the statutory limit on the basis of time and a half. The Court below further held that even though a statute does not explicitly provide for a remedy, that where a statute was manifestly passed for the benefit and protection of a laborer, the party who has suffered from this violation of duty has a cause of action. *Abounader* v. *Strahmeyer & Arpe Co.*, 243 N. Y. 458, 465; see, also, *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 751; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 456-458 (R. 135).

The Court below has aptly put the incongruity of petitioners' contention when it said:

> "With the beneficial purposes of the statute so manifest, if plaintiff may not sue to enforce it, the benefits accorded would indeed be empty and illusory. He would find himself in the position of having been given a benefit he is unable to enjoy, a right he is helpless to enforce" (R. 135).

Also *McNulty* v. *City of New York*, 238 N. Y. 29; *City of Phoenix* v. *Drinkwater*, 46 Ariz. 470; cf. *Austin* v. *City of New York*, 258 N. Y. 113; *Campbell* v. *City of New York*, 128 Misc. 382).

The comparison by the petitioners of the Eight Hour Law with the Bacon-Davis Act, Fair Labor Standards Act, Walsh-Healey Act and the Portal to Portal Pay Act, rather sustains the opinion of the Court below as these Acts are specific with regard to the method of recovery by employees and provide special remedies over and above the ordinary right of a party to sue for the benefits of an act under the general law. The mere fact that the Portal to Portal Act did not restrict recovery under the Eight Hour Law, clearly permits recovery under the general law.

3. *The employee's right to sue as third party beneficiary*: It is respondent's contention that with regard to this doctrine, this being purely of local law and Court below having in any case sustained the right of recovery of the judgment as a third party beneficiary (*Lawrence* v. *Fox*, 20 N. Y. 268, *Seaver* v. *Ransom*, 224 N. Y. 233), this Court in accordance with its rules cannot disturb the verdict even though it should disagree with the Court below on the previous question of the right of the employee to sue under the statute. *Williams* v. *Kaiser*, 323 U. S. 471; *Atchison T. & S.* v. *Railroad Commission of State of California*, 283 U. S. 380; *Scott* v. *Platt*, 137 P. 2nd 975.

However, even on the merits, the Court below was correct in holding the respondent to be entitled to recovery under the third party beneficiary doctrine even under Federal Law by reason of the pertinent clause in the contract (R. 98). *German Alliance Insurance Co.* v. *Home Water Co.*, 226 U. S. 220, 230; *Robins Dry Dock and Repair Co.* v. *Flint*, 275 U. S. 303, 307, when it stated as follows:

> "In our view, that agreement when related to the statute, was, in effect, a promise to pay their

> workers such extra compensation for overtime work, and, entitled an aggrieved laborer or mechanic to enforce that promise as a third party beneficiary. (See *United States* v. *Morley Constr. Co.*, *supra*, p. 789; *Crabb* v. *Welden Bros.*, 65 Supp. 369, 377; see, also, *Seaver* v. *Ransom*, *supra*, p. 238; *Fata* v. *Healy Co.*, 289 N. Y. 401; *Stong* v. *American Fence Constr. Co.*, 245 N. Y. 48; *Novosk* v. *Reznick*, 323 Ill. App. 544.)" (R. 137.)

The basis of petitioners' argument that the Eight Hour Law was not intended for the direct benefit of "laborers and mechanics" concerning whom the Act sought to cover is contradicted by its own previous citation in its brief on page 12, in 34 Op. A. G. 257, wherein petitioners quote as follows:

> "The purpose of the statute under consideration (*i. e.* the Eight Hour Law) is for the improvement of labor conditions."

How then can petitioners argue in the same breath that the Eight Hour Law is to improve labor conditions and yet claim that the statute is not for the benefit of laborers and mechanics mentioned in the act? In fact, a study of the whole history of all labor legislation shows that the laws were enacted solely to benefit the working man and to raise his standard of living. If he has worked and cannot recover for his work so that his standard of living can be improved, the statutes are of no benefit to him. It might just as well have never been passed.

With respect to the correctness and the force of the entire opinion below, it is but necessary to quote the opinion of a recent case under the Eight Hour Law, just decided in the United States District Court of Massachusetts, that of *Veader* v. *Bay State Dredging* and reported now only in 17 Law Weekly 2020, wherein Judge Ford stated:

"There is no need to repeat here the reasoning of this case (*Filardo* v. *Foley Bros.*, 297 N. Y. 217). I agree with the reasons advanced for concluding that a cause of action is given by statute." (Parentheses ours.)

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

August 1948.

Respectfully submitted,

CHESTER A. LESSLER,
Attorney for Respondent.

HOWARD HENIG,
Of Counsel.

LIBRARY
SUPREME COURT U.S.

No. 91.

DEC 10 1948

IN THE

Supreme Court of the United States

October Term, 1948.

FOLEY BROS., INC. and SPENCER, WHITE and PRENTIS, INC.,

Petitioners,

vs.

FRANK PAUL FILARDO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

BRIEF FOR RESPONDENT.

CHESTER A. LESSLER,
Attorney for Respondent.

HOWARD HENIG,
Of Counsel.

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	2
Summary of Argument	4
I. The Eight Hour Law Has Extra-Territorial Effect	7
A. The History of the Eight Hour Law	7
B. All Authorities on the Point, Have Consistently Held That the Eight Hour Law Has Extra-Territorial Effect	9
C. Petitioners' Argument on This Point Is Unsound	13
II. The respondent employee has a right to sue under the statute	16
III. Respondent is entitled to recover under the third party beneficiary doctrine	21
Conclusion	23
Appendix A	25

CASES CITED.

Abounader v. Strohmeyer & Arte Co., 243 N. Y. 458, 465	15
Alaska Packers Association v. Industrial Accident Comm., 294 U. S. 532, 542-543	13
Blackmer v. United States, 284 U. S. 421, 437	9
Bruce's Juices v. American Can Co., 330 U. S. 743, 751-751	20

PAGE

City of Phoenix v. Drinkwater, 46 Ariz. 470, 476 . . 20
Coleman v. United States, 81 Fed. 824, 826 18
Connell v. Vermilya-Brown Co., 164 F. 2nd 924 . . . 12

German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220, 230 21
Gibbons v. Ogden, 9 Wheat. 188 9
Gulla v. Barton, 164 A. D. 293 22

Helvering v. Mitchell, 303 U. S. 391, 399 15

Industrial Commission v. McMartin, 330 U. S. 622, 626. 13

Lawrence v. Fox, 20 N. Y. 238 21

Matter of Post v. Berger and Gohlke, 216 N. Y. 544, 549 13
McNulty v. City of New York, 238 N. Y. 29 20
Melsch v. Schulte, 273 N. Y. S. 699 22

National Labor Board v. Hearst Publications, 322 U. S. 111, 129 . . . . . 12, 18
N. B. Deal & Co. Inc. v. Martin, Ark. Sup. Ct. 1946, 193 S. W. 2nd 315 22

Overnight Motor Co. v. Missel, 316 U. S. 572 20

Page v. Kilgore, 131 S. W. 2nd 730 (1944) 22
Prescott v. Collins, 263 App. Div. 690 21

Robbins Dry Dock v. Flint, 275 U. S. 303, 307 21
Rose v. Himely, 4 Cranch. 241, 279 9

Seaver v. Ransom, 224 N. Y. 233 21
Solover Bates & Co. v. Walsh, 226 U. S. 111, 123. . 13
Strong v. American Fence Construction Co., 245 N. Y. 48 21
Swisher v. The United States, 57 Ct. of Claims, 123 18

PAGE

Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks, 281 U. S. 548 18
Texas & Pacific Railway v. Rigsby, 244 U. S. 33, 39 ..... 18, 19
The Appollon, 9 Wheat. 362, 370 9
Timmonds v. United States, 84 Fed. 933, 935 18

United States v. Bennett, 232 U. S. 299, 304 14
United States v. Bowman, 260 U. S. 94, 98 9
United States v. Martin, 94 U. S. 400 (1876) 17
United States v. Moses, 126 Fed. 58 18
United States v. National Surety, 309 U. S. 165 21
United States v. Post, 148 U. S. 124 ..... 5, 17

Walling v. Patton-Tulley Transp. Co., 134 F. 2nd 945 ..... 18, 22
Warner v. Goltra, 298 U. S. 155, 158 18

STATUTES AND AUTHORITIES CITED.

28 U. S. C. 1257 (3) 1
Secs. 324, 325A U. S. C. 4, 7, 8, 9, 13, 16, 18, 22
15 Stat. 77 Ch. 72 7
27 U. S. Stat. 340, Chap. 352 7
Sec. 322 U. S. C. 7
39 U. S. Stat. 1192, Chap. 180 7
23 Cong. Rec. 5724-5732 8
48 Cong. Rec. 381-385, 394-395 8
54 Cong. Rec. 2586-2590, 3150-3151 8
86 Cong. Rec. 11216-11219 8
25 Op. Atty. Gen. 441 (1905) 10
34 Op. Atty. Gen. 257, 261 11
29 Op. Atty. Gen. 488 11
Code of Fed. Reg. Cum. Supp. Tit. 3, P. 850 11
39 Op. Atty. Gen. 418, 422 15
25 U. S. Stat. 157, ch. 308 17
Letter Carrier's Act of 1888 (25 U. S. Stat. 157, Ch. 308) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

FOLEY BROS., INC. and SPENCER, WHITE and PRENTIS, INC.,
Petitioners,

vs.

FRANK PAUL FILARDO,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Supreme Court of the State of New York, New York County, is set forth in the record (R. 81, 82-84). The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department (R. 129-131) is reported at 272 A. D. 446. The opinion of the Court of Appeals of New York (R. 132-138) is reported at 297 N. Y. 217.

Jurisdiction.

The jurisdiction of this Court was invoked under 28 U. S. C. 1257 (3). The petition for certiorari was granted on October 11, 1948.

Questions Presented.

1. Whether the Eight Hour Law, and particularly Sections 324 and 325A, Title 40, U. S. C. has extra-territorial effect outside of the United States, and if this question is answered in the affirmative, then,

2. Whether an employee has a right of action to recover his just overtime pay, either (a) under the statute, or (b) as a third party beneficiary by reason of the contractual provisions in the contract between the petitioner herein and the United States.

All of these questions were ruled upon by the Court of Appeals and were answered unanimously in the affirmative (R. 132-138).

Statutes Involved.

The statutes involved and to be construed are Sections 324, 325A and 326 of Title 40 of the U. S. C.

Statement.

The facts in this case are not in issue and are therefore undisputed. The respondent, an American citizen, was a cook and employed in the City of New York, by the petitioners, to work on public projects in Iraq and Iran, in which the petitioners were engaged, in accordance with a contract had with the War Department of the United States Government, during the year 1942 (R. 44, 87, 88). Pursuant to the terms of the employment, respondent was transported from New York to Iraq, arriving there in March 1942, and thereafter was assigned as a cook to a camp at Ahwaz, Iran, and in May 1942, when he found out he was not receiving overtime pay for hours worked in excess of eight hours a day, he protested and made a demand for the same, which was disapproved (R. 18, 19). Respondent then was assigned to a camp in the desert in Iran (R. 19), and worked there from June 1942 to Decem-

ber 31, 1942, and upon returning to the base in March 1943, filed another claim for overtime (R. 22) and another in New York when he arrived in June 1943 (R. 23, 95, 96). Respondent's testimony as to overtime was supported by the assistant foreman of the camp (R. 37-40), and it was further testified that he and other employees received overtime pay at time and a half (R. 38, 39). At the close of the case, the petitioner moved to dismiss on all the grounds raised herein and on the additional ground that the respondent was not a laborer within the meaning of the Eight Hour Law (R. 49). Said motions were denied, and the jury awarded a verdict to the respondent in the sum of $2,496.36 for overtime pay on the basis of 1,172 hours overtime (R. 85).

The third party beneficiary doctrine is involved because the contract that the petitioners had with the United States contained the following clause, that the petitioner agreed to "abide by all applicable laws, regulations, ordinances and other rules of the United States of America of the States, Territory, all political subdivisions thereof, or any other duly constituted public authority wherein the work is done" (R. 98). The judgment of the trial court was thereafter appealed by the petitioners to the Appellate Divsion, State of New York, First Department, and said judgment was reversed (three justices voting to reverse and two justices voting to affirm), which court passed on only one question, to wit, right of action under the statute for overtime pay (R. 131). An appeal was thereafter taken by the respondent to the Court of Appeals of the State of New York, which reversed the judgment of the Appellate Division and reaffirmed judgment of the trial court unanimously on all questions (R. 132, 138). It is respondent's contention that the trial court and the Court of Appeals of the State of New York were eminently correct in deciding all the questions presented herein in favor of the respondent.

Summary of Argument.

I.

The Eight Hour Law applies extra-territorially. The literal language of the act itself would include all contracts performed within or without the United States, its territory or its possessions. There is no question but that Congress has the power to legislate regarding the conditions of work on public contracts and especially in regard to the civil aspects of said Statute.

The purpose of the Eight Hour Law under consideration is to benefit the American worker on public construction everywhere and all of the governmental agencies which have had the occasion to interpret the geographical extent of the act have held that it extends beyond the borders of the United States, its territory and possessions, at least with respect to American laborers and mechanics on public conracts.

Furthermore, with the advance of our political thinking, whereby the United States Government has committed itself as a world power with far flung interests, it certainly was within the intent of the present day Congress to protect the American laborer everywhere working under American supervision, on government projects, paid for by American money, and with American materials, and to give him at least the same standard of wage as other Americans employed at home on similar projects.

II.

Section 324 of the U. S. C., when read together with Section 325A, confers upon those encompassed by the Act the right to sue for the failure of any contractor to abide by its provisions, and specifically for the required overtime pay for work done and benefits received. While it is true that prior to the 1940 amendment (Section 325A), which specified that time and a half was to be paid for all

overtime work, the interpretations of this court were that a laborer or mechanic covered by the act had no right to sue because of the statutory omission to prescribe a rate of pay, this defect is no longer present since the 1940 amendment. The necessary language which led the court to rule concerning a similar statute in connection with the Eight Hour Law, that a beneficiary thereunder had a right to sue for overtime pay under the Eight Hour Law (Letter Carrier's Act of 1888, *United States* v. *Post*, 148 U. S. 124) is now supplied by Section 325A and confers a right to sue for overtime pay to laborers and mechanics on public works under contracts with the Government.

Where a statute does not explicitly provide for a remedy but is manifestly passed for the benefit and protection of certain classes thereunder, the party who has suffered or been aggrieved has a cause of action for the benefits under the statute. This has been held to apply in statutes of similar nature, to wit, Workmen's Compensation and Minimum Wage Statutes in this and other jurisdictions.

The petitioners, in their brief, while admitting this to be a general rule, argue in opposition to this point that the Statute in question were not enacted for the benefit of the laborer or mechanic on public works, and attempt by circuitous reasoning to show that the statute was enacted for the benefit of the public generally. A reading of the Statute itself, which is unambiguous and clear, specifically designates the persons to be benefited as being laborers and mechanics engaged on public works for the United States Government. The various agencies which have passed upon the statute, have affirmatively stated that the statute was passed solely for the benefit of the laborers and mechanics employed under public contracts. A reading of the Congressional Record prior to the passage of the Act and various amendments further confirm this contention. The argument therefore is against the plain reading of the Statute and its amendments and its common sense interpretation.

III.

The employee has a right to sue as a third party beneficiary by reason of the inclusion in the contract that the petitioner had with the United States Government for the construction of said public works in Iraq and Iran, the provision that the petitioner agreed to "obey and abide by all the applicable laws, regulations, ordinances and other rules of the United States of America of the States, Territory or all Political Subdivisions thereof or any other duly constituted public authority, wherein the work is done" (R. 98).

Where a clause is inserted in a contract, which is manifestly for the benefit of a specific class of persons, to wit, laborers and mechanics on public works of the United States, the third party beneficiary doctrine applies both under Federal law as well as the law of the State of New York. The Eight Hour Law, and particularly the provision as to time and a half for overtime pay has heretofore been demonstrated as benefiting those workers and laborers employed by the government either directly or by contractors who have contracts with the government for the building of public works (Point II).

A fair reading of this clause in the contract would include the Eight Hour Law if held applicable under Point I. To read the contract in the manner petitioner suggests would invalidate the contract and prohibit any payment thereunder. It is a rule of law, that where a contract can be read so as to make it legal, the courts will not interpret it as to render the contract illegal and unenforceable.

I.

The Eight Hour Law Has Extra-Territorial Effect.

A. The History of the Eight Hour Law.

It would be well to review the history of the Eight Hour Law. The first "Eight Hour Law" was enacted in 1868, and at that time merely contained a provision that laborers and mechanics on all public works constructed by the government, were not permitted to work more than eight hours per day (15 Stat. 77 ch. 72). Thereafter, and in 1892, the aforesaid Eight Hour Law was re-enacted to the same effect, but added sanctions, in that failure to abide by the aforesaid law because a misdemeanor, 27 U. S. Stat. 340, Chap. 352; Sec. 322 U. S. C. Thereafter and in 1912, the same law was re-enacted and broadened to include laborers and mechanics who were employed by contractors who had public contracts with the United States Government, as well as such employees of the government, and added the civil sanction of $5.00 a day for each violation of the law (Sec. 324 U. S. C.). Thereafter, and in 1917, during the First World War, there was voted presidential powers to suspend the operation of the Eight Hour Law with respect to all of the aforesaid in case of a national emergency, provided that there was a premium pay at not less than one and one-half times the regular rate over and above the basic Eight Hour Law (39 U. S. Stat. 1192, Chap. 180). These powers were enacted permanently into the law in the present Section 326 of the Statute.

In September 1940, before our entry into the Second World War, Congress realizing the necessity of extensive military construction at home and abroad for the defense of the country, enacted Section 325A, which provided that the Eight Hour Law be suspended on the condition that

all laborers and mechanics thereunder who worked in excess of eight hours per day, be compensated at at least one and one-half times the basic rate of pay. There was also a provision in the Eight Hour Law which required that all contracts on such public works should contain a provision to comply with said law (Sec. 324).

A fair reading of the Congressional Record shows that the law was intended directly to benefit the American laborer and mechanic employed by the Government in the building of public works, and that it was the further aim of Congress by its treatment of Government workers to set private industry and the world an example in the betterment of working conditions in the hope that others would follow. Therefore, the intention is clear that at least that group designated by the Statute, to wit, mechanics and laborers, working for or on behalf of the United States Government, were to be directly benefited. True, indirectly, it was intended to show the world an enlightened policy with regard to labor. Such however is the broad aim of every advanced labor or social legislation. (23 Cong. Rec. 5724-5732; 48 Cong. Rec. 381-385, 394-395; 54 Cong. Rec. 2588-2590, 3150-3151; 86 Cong. Rec. 11216-11219).

This is even more applicable to Sec. 325A, which is the primary one under discussion and because of which respondent's right ensues. In the discussions in Congress concerning the passage of this amendment, which was by way of an amendment to the Naval Appropriations Bill, Congress discussed public constructions outside the continental United States on the question of the waiving of a bond for such constructions (86 Cong. Rec. 11219). This discussion came hard after the passage of Sec. 325A, where there was no discussion. Certainly, the two were close enough on the agenda for Congress to realize that the employment of men on public works on behalf of the Government were the same public works on which a bond was sought to be waived.

B. All Authorities on the Point, Have Consistently Held That the Eight Hour Law Has Extra-Territorial Effect.

A reading of the statute, which is unambiguous and clear, states as follows:

> "*Every* contract made to which the United States, * * * is a party and every such contract made for or on behalf of the United Sttaes" (Sec. 324). (Italics ours.)

The common sense meaning of "every" is too clear to be broken down any further. *Gibbons* v. *Ogden*, 9 Wheat. 188. In this latter case, Justice Marshal said that Congress "must be understood to have employed words in their natural sense and to have intended what they have said." That Congress has the power to legislate extra-territorially, particularly with respect to its own citizens, is conceded by the petitioners, and especially with regard to the matters at hand (Pet. Brief, p. 12). *Rose* v. *Himely*, 4 Cranch. 241, 279; *The Appollon*, 9 Wheat. 362, 370; *Blackmer* v. *United States*, 284 U. S. 421, 437; *United States* v. *Bowman*, 260 U. S. 94, 98. In the latter two recent cases cited, although the extra-territorial effect was not as clearly indicated as in the case at bar, the power of Congress to legislate extra-territorially, over its citizens wherever situated, was confirmed. The Court below had no difficulty in ascribing extra-territorial effect to this statute when it said: "Words of such inclusive reach cannot properly be read to exclude contracts of government jobs abroad" (R. 136).

The administrative branches of the Government of the United States, ever since it was called upon to interpret the extra-territorial effect of this statute, had no difficulty in reaching the same conclusion especially as applied to American workers as they have unanimously maintained

that the Eight Hour Law at its various stages of amendment has extra-territorial effect. In 25 Op. Atty. Gen. 441 (1905), Attorney General Moody in reply to the Secretary of War for an opinion directly to this point stated as follows:

> "Although the Canal Zone is now within the sovereign jurisdiction of the United States and hence within the legislative power of Congress, Congress has not legislated for it except so far as I have indicated and the case stands so far as the applicability of the act of 1892 is concerned exactly as if the territory were beyond the legislative powers of the United States.
>
> But although Congress has no power to enact laws which shall apply beyond the jurisdiction of the United States, it still has power to determine what shall be the length of the days' work of any and all persons employed by the Government or by contractors of any public works undertaken by the United States anywhere. Congress may if it chooses fix the hours of labor in the work of the United States wherever it is conducted and make the law binding on the officers of the United States and through the agency of the contract through the contractors with the United States. In other words, it may direct the action of its own officers and agents and dictate the terms of its contracts made with the Government. The law thus becomes applicable anywhere" (p. 444).

At this time, the Act of 1892 was in force and the question concerned mechanics and laborers working in the Panama Canal Zone in the building of the Canal, which at that time was conceded by the Attorney General, to be "a foreign territory."

Subsequently, it is true, this was held in 34 Op. Atty. Gen. 257, 261, to apply only to American workers as against alien laborers, but said opinion specifically concurred with Attorney General Moody as to the extra-territorial effect of the Eight Hour Law. Also, 29 Op. Atty. Gen. 488.

Furthermore the Comptroller General of the United States, when called upon to render an opinion concerning the extra-territorial application of the Eight Hour Law, had no difficulty in coming to the same conclusion and has held the Eight Hour Law to have extra-territorial effect at least with respect to American laborers and mechanics working on public projects for or on behalf of the United States (19 Comp. Gen. 516, 518). In this case the question put was whether the provisions of the Eight Hour Law should be included in a contract for work in a foreign country which required the employment of foreign laborers. His answer to the question was in the negative as long as it concerned the employment of foreign laborers or mechanics. The entire discussion by the Comptroller General was to the effect that the Statute was for the protection of American workers in foreign countries and not foreign workers.

The President of the United States also has interpreted the Act as having extra-territorial effect as is evidenced by his promulgation of Executive Order No. 8623 (Code of Fed. Reg. Cum. Supp. Tit. 3, P. 850). In that Order the President specifically exempted public construction built under contracts with the Government in Bermuda from the application of the Eight Hour Law and it must be further assumed that this was taken upon the advice of the then Attorney General; petitioner has attempted to minimize the importance of this regulation by stating that Bermuda has been held by the Circuit Court of Appeals, Second Circuit, to be a Territory or Possession of the United States which case is now pending before this Court. *Con-*

nell v. *Vermilya-Brown Co.*, 164 F. 2nd 924.* This was not the position of the Government at the time the Executive Order was issued nor was it the position of the Solicitor General in the recent argument in the above case before this Court, in attempting to overrule the Circuit Court of Appeals, where he contended that Bermuda was a foreign territory even though under lease.

Furthermore, in interpreting the broad language of a statute this court has said in *National Labor Board* v. *Hearst Publications*, 322 U. S. 111, 129:

> "In this light, the broad language of the acts, the definitions which in turn rejected conventional limitations of such conceptions as 'employee', 'employer' and 'labor dispute', leaves no doubt that its applicability is to be determined broadly in doubtful situations by underlying economical facts rather than technically and exclusively by previously established legal classifications."

And further, in the same case, this Court went on to say that the terms used, like other provisions, must be understood with reference to the purpose of the act and the facts involved in the economic relationship and said "where all the conditions of the relation require protection, protection ought to be given" (p. 129).

In the case at bar, there is no question but that an American laborer, who leaves his home and country to work on foreign soil under intolerable and substandard

*This case has since been decided by this court by opinion handed down on December 6, 1948, and some of the language of the majority opinion can be related to this case, and is as follows:

> "A fortiori, civil controls may apply, we think to liabilities created by statutory regulation of labor contracts even if aliens may be involved where the incidents regulated occurred in areas under the control and not within the territorial jurisdiction or sovereignty of the nation enacting the legislation." (Page 4.)
>
> "Under such circumstances our duty as a court is to construe the word possession, as our judgment instructs us the law makers, within constitutional limits, would have done and had they acted in the type of the legislation with the present situation in mind." (Page 10.)

conditions (as in the case at bar where respondent worked in the heat of the desert for stretches of 16 hours at a time) is entitled to equal protection under the law as those at home, especially when protection can be given under the terms of the Act. To hold otherwise, would contravene the manifest purpose of the Congress when Section 325A of the U. S. C. was enacted with full knowledge of the fact that these American workers would be used on government contracts abroad.

Similarly, Workmen's Compensation Acts enacted by various states, have been held by this Court and the State Courts, to have extra-territorial effect with respect to the sovereignty of each state. *Industrial Commission* v. *McMartin*, 330 U. S. 622, 626; *Alaska Packers Association* v. *Industrial Accident Comm.*, 294 U. S. 532, 542-543; *Matter of Post* v. *Berger and Goldie*, 216 N. Y. 544, 549; *Schover Bates & Co.* v. *Walsh*, 226 U. S. 111, 123.

The Department of Labor, in response to an inquiry, also answered this particular question in the affirmative and stated as follows:

> "In view of the fact that this opinion (34 Op. Atty. Gen. 257) is limited to aliens working in foreign countries and since the attorney general indicated that this opinion is not inconsistent with that reported at 25 Op. Atty. Gen. 441, the conclusion seems to be that the Eight Hour Law is applicable to an American citizen working in a foreign country provided that the worker otherwise comes within the provisions of the act" (Letter 10 16 46 App. A).

C. Petitioners' Argument on This Point Is Unsound.

The attorneys for the petitioners in their brief have engaged in semantics in attempting to destroy the forcefulness of the opinion below and the respondent's contentions, both in answer to this point and the remaining points.

at issue. This straining and subtle differentiations of words, meanings and intents have characterized their effort and their conclusions are far removed from the real purposes of the Act, and the common sense interpretation considered under the light of our present advancement in our social and political thinking. If this court had construed the Constitution of the United States in the manner prescribed by the arguments of the petitioner in this case, that document would indeed be a document of strangulation. However, such elasticity of interpretation is not even needed in interpreting the Act at issue. Petitioners' type of argument has been commented upon by this Court in the case of *United States* v. *Bennett*, 232 U. S. 299, 304, as follows:

> "We come now to consider the contention that when the statute is correctly interpreted there will arise a conflict between its provisions and the safeguards of the situation, not only for the purpose of demonstrating the unsoundness of the assertions but also with the object of making it clear that even if the statute was susceptible of a duplicate construction by resort to subtlety of reasoning or refinement of distinction, there is nothing of such gravity in the asserted constitutional question as to lead us to resort to such means in order to avoid giving to the statute the meaning which we have affixed to it resulting from its unambiguous text."

Furthermore, the Solicitor General of the United States, in opposing respondent's arguments, in an attempt to justify its present position and realizing full well that it has a primary duty to enforce the Acts of Congress and to protect the American citizen, has practically admitted that the only reason he is opposing the enforcement of the statute is because the United States Government is in the position of an employer in this case (Pet. Brief, p. 11). It never was the function of the Attorney General's Office

of the United States to oppose the just interests of the citizens of this country and their protection under the law, merely because the Government has a financial interest in the outcome and to interpret the laws for its own pecuniary benefit just as any self-centered or greedy individual.

In attempting to distort the clear meaning of the Act and the previous authorities which have held the Eight Hour Law to have extra-territorial effect, the attorneys for the petitioners have strained the wording of the Statute to such an extent as to find themselves in the unenviable and anomalous position of supporting alien labor to the detriment of American laborers to whom they owe a prime duty of protection under our laws. In defense of their opposition, the government's attorneys have been forced to the conclusion that the Act should protect alien workers as well as American workers and since the Act has been held not to include alien workers, therefore American workers are likewise not to be protected (Pet. Brief, pp. 30-32). We are herewith concerned with the protection of American laborers and all of the authorities that have so far passed upon this point have concluded at least that the American laborer comes within the coverage of the Act, both by intent and by its language.

In attempting to show that the Eight Hour Law should not be construed extra-territorially, the petitioner makes much of the fact that this is a criminal statute and hence ordinarily is not applicable extra-territorially. Petitioner indicates that civil statutes, however have a much broader scope and application. Although petitioner practically destroys this tenuous argument by admitting that criminal statutes have also been interpreted to have extra-territorial scope (Pet. Brief, p. 15) we are however dealing with the civil aspects of the Statute and the criminal aspects have no bearing on the matter.

Previous authorities have held that the Eight Hour Law and similar statutes have both criminal and civil remedies. 39 Op. Atty. Gen. 448, 422; *Helvering* v. *Mitchell*, 303 U.

S. 391, 399; *Alexander v. Strohmeyer & Arle Co.*, 243 N. Y. 458, 465. In 39 Op. Atty. Gen. 418 (*supra*), Attorney General Jackson said in construing the Eight Hour Law:

> "It is my opinion therefore that the sanction provided for in the 1912 act is civil or remedial and not criminal" (p. 422).

Certainly Section 325A has no criminal purpose, as the provisions are purely civil and it is the benefit of this remedy which the respondent seeks to avail himself. The Court below in discussing this point said:

> "Insofar as the civil aspects of the statute are concerned * * *" (R. 37).

The reading of the Congressional Record during the passage of the Eight Hour Law and its amendments, show that Congress intended to directly benefit the American worker employed under Government contracts and certainly at the time of the passage of Section 325A in 1940, intended to protect American laborers working in foreign lands on Government projects as it was well within the contemplation of that Congress that the naval appropriation was specifically for the purpose of building bases for our protection everywhere in the advent of war.

II.

The respondent employee has a right to sue under the statute.

Under the Act of 1868, the Eight Hour Law merely contained a provision that a laborer or mechanic employed by the Government on its public works could not be employed for more than eight hours a day. While this law was still in effect, this Court interpreted said act to be merely a directive in the Government's administrative capacity and that an employee could not recover against the

government for overtime pay, as there was nothing stated therein governing the rate to be paid. In *United States* v. *Martin*, 94 U. S. 400 (1876), the Court stated:

> "It does not specify any sum which shall be paid for eight hours nor that the price shall be more than the eight hours are greater or less when the hours are fewer."

However, subsequently, this Court ruled under the Letter Carrier's Act of 1888 (25 U. S. Stat. 157, ch. 308), that a letter carrier could sue the Government for overtime pay for hours in excess of eight hours per day under the Eight Hour Law (*United States* v. *Post*, 148 U. S. 124). Said Act read as follows:

> "Hereafter eight hours shall be considered a day's work for letter carriers in city and postal district connected thereto for which they shall receive the same pay as is now paid for a day's work of a greater number of hours. If any letter carrier is employed a greater number of hours per day than eight, he shall be paid in the same proportion to the salary fixed by law."

The Court therefore stated in *United States* v. *Post* (*supra*):

> "The statute was manifestly one for the benefit of the carriers and it does not lie in the mouth of the Government to contend that the employment in question was not extra service and to be paid for as such * * *." (p. 133).

Subsequently, cases under the Eight Hour Law were brought by employees on public works who were not covered by the Postal Act, and the courts consistently held that the reason for denial of the right of action was because the then Eight Hour Law and Amendments contained no provisions prescribing a rate of pay as to employees

other than postal employees. *Coleman* v. *United States*, 81 Fed. 824, 826; *Swisher* v. *The United States*, 57 Ct. of Claims, 123; *Timmonds* v. *United States*, 84 Fed. 933, 935; *United States* v. *Moses*, 126 Fed. 58.

In the case at bar, the amendment of 1940 (325A U. S. C.), which prescribes the rate of pay and the time supplies the same omissions to the Eight Hour Law as did the Letter Carrier's Act, which enabled an employee to sue thereunder. The Court below in its opinion states as follows:

> "So read the statute differs little from the Letter Carrier's Act, * * *, which has been interpreted to bestow a right to sue upon employees within its coverage" (R. 134).

More generally, this Court has held that where a statute was passed for the benefit and protection of certain classes of persons that said person has a cause of action for damages in the event of violation, although the statute does not provide such a remedy. *Warner* v. *Goltra*, 298 U. S. 155, 158; *Texas & Pacific Railway* v. *Rigsby*, 241 U. S. 33, 39; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2nd 945; *National Labor Relations Board* v. *Hearst Pub.* (*supra*).

In the case of *Walling* v. *Patton-Tulley Transp. Co.* (*supra*), the Eight Hour Law was construed directly and the Court had no difficulty in holding that the Act applied to a limited classification of employees in a certain definite class for the Court said:

> "We perceive no difficulty in the reconcilement of the Eight Hour Law amendment with the Fair Labor Standards Act. The one limits employment as basic pay to 40 hours a week and the other deals

solely with daily employment of men *in certain classifications* and limits such employment at basic pay to eight hours a day" (p. 748). [Italics ours.]

In the case of *Texas & Pacific Ry. v. Rigsby* (*supra*), this Court said:

> "A disregard of the command of the statute is a wrongful act and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover damages from the party in default is implied * * *" (p. 39).

In the aforesaid case, the statute involved was the Safety Appliance Act, which provided a similar type of civil penalty, in that the violator was penalized $100.00 for each violation and the statute gave no right to sue to an injured employee. Yet the Court upheld the right of an employee to sue under the statute because he was a beneficiary under the Act.

While the petitioner, in opposition to this point, tacitly concedes that if it was the intention of Congress to benefit the worker covered by the Eight Hour Law then a right of action would accrue (Pet. Brief, p. 42) he claims that the worker was not the beneficiary. Again a fair reading of the statute (which in so many words states that laborers and mechanics on public contracts are to be compensated at time and a half for all hours over eight hours per day [Sec. 325A]), could only mean that those workers were to be the recipients of the overtime pay. The court below on this point said:

> "The statute it will be seen has a two fold purpose. One is to secure to the individual workman a minimum living wage fixed by law and the other is

to penalize the employer who fails to pay that wage . . .

If we recognize—as we believe as we must, that the Eight Hour Law sought to elevate labor standards in employment on public works by requiring the employer to pay extra compensation for hours in excess of eight (see *Walling* v. *Patton-Tully Transportation* [*supra*], [p. 949]), it would be both unreasonable and unjust to say that that laborer has no claim for overtime pay. We conclude that such could not have been the legislative purpose" (R. 135).

Overnight Motor Co. v. *Missel*, 316 U. S. 572; *City of Phoenix* v. *Drinkwater*, 46 Ariz. 470 476; *McNulty* v. *City of New York*, 238 N. Y. 29; *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 750-751.

The Act, particularly Section 325A, is directed to a limited class of persons as it covers only "laborers and mechanics" working on public contracts as opposed to all other persons working for the Government or in private industry. How can the petitioners argue, in the face of this clear language, that those persons mentioned are not in a specific category and hence not a class to be benefited? Furthermore, the discussions in the Congressional Record, since the passage of this Act, shows that Congress was very conscious of the fact that only employees of the Government came within the protection of the Act as opposed to private industry, and doubtful supporters of this Act made it very clear that it was not to apply to private industry and that private employers were free to contract and bargain without statutory control (Cong. Rec., *supra*).

III.

Respondent is entitled to recover under the third party beneficiary doctrine.

Even if it is held that the respondent has no right to sue under the statute itself he does have a right to recover by reason of the inclusion in the contract that the petitioner had with the United States Government of the provision, whereby the petitioner agreed to "abide by all applicable laws, regulations, ordinances and other rules of the United States of America of the State, territory or political subdivision thereof or any other duly constituted public authority, wherein the work is done" (R. 98).

There is no difference between the Federal Law and the law of the State of New York, on the question of third party beneficiaries. Both jurisdictions hold in general, that before the third party beneficiary doctrine can be invoked, there must be a benefit to a particular class of persons. *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U. S. 220, 230; *United States* v. *National Surety*, 309 U. S. 165; *Robbins Dry Dock* v. *Flint*, 275 U. S. 303, 307; *Lawrence* v. *Fox*, 20 N. Y. 238; *Seaver* v. *Ransom*, 224 N. Y. 233; *Strong* v. *American Fence Construction Co.*, 245 N. Y. 48; *Prescott* v. *Collins*, 263 App. Div. 690.

In the case of *Prescott* v. *Collins* (*supra*), the New York State court specifically declared that its rulings were the same as in the Federal courts, and cited the Federal cases in support thereof. Therefore, the suggestion in petitioner's brief at the foot note at page 44, that the Court below did not see any difference between the Federal law and the New York law and hence erred in its conclusion, is erroneous.

Petitioner's real objection revolves around the same point that they have made consistently, *i. e.* that the Eight Hour Law and its amendments were not to benefit laborers

and mechanics employed by the Government or by contractors for the Government. This conclusion has been demonstrated previously to be unsound and contrary to a plain reading of the statute and the specific words contained therein. The Court below stated in this regard as follows:

> "In our view, that agreement when related to the statute, was in effect a promise to pay their workers such extra compensation for overtime work entitled and aggrieved laborer or mechanic to enforce that promise as a third party beneficiary" (R. 137).

The Eight Hour Law, by it's terms confers a benefit upon laborers and mechanics on public contracts for or on behalf of the government, and require that they be paid time and a half for all hours worked over eight hours a day (Secs. 324-325A U. S. C.). Other courts, in the construction of the Act on this very point, have concurred with the decision arrived at by the court below. *N. B. Deal & Co. Inc.* v. *Martin*, Ark. Sup. Ct. 1946, 193 S. W. 2nd 315; *Page* v. *Kilgore*, 131 S. W. 2nd 730 (1944); *Wallington* v. *Patton-Tulley Transp. Co.* (*supra*).

Generally, the labor union cases (contracts between a union and an employer) and the N. R. A. cases, have also held that the provisions therein are for the benefit of the employee and an employee has a right of action under the third party beneficiary doctrine. *Gulka* v. *Barton*, 164 A. D. 293; *Mesleh* v. *Schulte*, 273 N. Y. S. 699. The discussion in Congress during the passage of the Eight Hour Law of 1892, further demonstrates that the specific class of workers meant to be benefited directly were the government laborers and employees on public contracts and that as an example of humanity, it would show the world that this Government, at least, was humane as to its workers. 23 Cong. R. 5727.

The petitioner's argument that the wording of the clause in the contract cannot be read to include the Act is wholly opportunistic, for if the Government would have withheld payment on the ground the said contract did not contain a clause by which petitioner agreed to abide by the terms of the Eight Hour Law, which was concededly a necessary requirement under the Statute (Sec. 324), the petitioners would be the first to point to this clause as complying with that mandatory provision. Furthermore, it is axiomatic in the law that the Courts will attempt to uphold the legality of a contract when it can be read to make it legal and will not interpret a contract so as to make it invalid if it is susceptible to two interpretations.

The argument of the petitioner, that the respondent is bound by the written contract between the parties, has no merit as one cannot avoid a statutory obligation and violate the law merely by agreement between the parties.

Conclusion.

It would appear that the arguments of the petitioner in attempting to persuade this court to overrule the judgment of the Court of Appeals, State of New York, is based upon intricate reasonings and subtleties that avoid the plain reading of the Statute and the common sense purposes of the Eight Hour Law and its Amendments. Actually, the previous actions of the petitioners and their attorneys in this matter belie their present position because all "laborers and mechanics" who unquestionably fell in the classification of laborer or mechanic, were paid overtime on this very job (R. 38). The only workers who were not paid overtime were those in a similar position to the respondent herein, such as cooks, whose classification in this regard was very doubtful in the opinion of the petitioners. One of their prime arguments in resisting payment in the Trial Court, was that this respondent was not

a "laborer or mechanic", within the meaning of the Act because he was a cook (R. 49-50). The Trial Court ruled, however, after the hearing of the evidence, that he was a "laborer or mechanic", within the meaning of the act and denied petitioner's application on that ground (R. 81). The attorneys for the Government realizing that there was no basis in fact to this contention abandoned this argument on the subsequent appeals.

Furthermore, the arguments raised by the attorneys for the petitioner are wholly in the realm of legalistic speculation and are far removed from the realities of the case for we have an American employer hiring American labor in the United States (New York) to perform services under a contract made with the Government of the United States in the United States using American materials for the benefit of the United States. Can the petitioners contend that under these circumstances the applicable laws of the United States as to conditions of such construction are not controlling and that Congress did not intend to so legislate?

It is respectfully submitted, therefore, that the judgment below should be confirmed.

December 1948.

CHESTER A. LESSLER,
Attorney for Respondent.

HOWARD HENIG,
Of Counsel.

Appendix A.

DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
Washington 25

October 16, 1946

Chester A. Lessler, Esquire
551 Fifth Avenue
New York 17, New York

Dear Mr. Lessler

This will reply to your letter of October 4, 1946, in which you indicate that you represent an American citizen who was employed as a cook during 1942 and 1943 in the construction of roads in Iran and Iraq, the roads being constructed by a contractor pursuant to a contract with the Government of the United States. You wish to know (1) whether an American citizen, who otherwise comes within the provisions of the Eight-Hour Law, is deprived of its benefits because his work was in a foreign country and (2) whether a cook is a 'laborer' within the coverage of the Act.

(1) In 25 Op. Atty. Gen. 441 (1905), the Attorney General was requested by the Secretary of War to express an opinion concerning the applicability of the Eight-Hour Law to laborers and mechanics engaged in the construction of the Panama Canal. The Attorney General pointed out that subsequent to the enactment of the Eight-Hour Law of 1892, the United States secured sovereign jurisdiction over the Canal Zone, but it has thus far (1905) failed to legislate for the Zone (with the exception of matters having no relation to the problem under consideration) so that 'the case stands' so far as the applicability

of the Act of 1892 is concerned, exactly as if the territory were beyond the legislative powers of the United States." He went on to say that inasmuch as Congress has authority to regulate labor conditions on government public works outside the territorial limits of the United States and since the language of the Eight-Hour Law is not limited to public works in the United States, the Act applies to employees working on such projects in foreign countries.

In 34 Op. Atty. Gen. 257 (1924), the Attorney General expressed the opinion that the Eight-Hour Law does not 'apply to work to be performed by alien laborers and mechanics upon public works of the United States within the territorial limits of a foreign country', because there cannot be imputed to Congress 'the intent to better labor conditions in a foreign country or benefit alien laborers and mechanics employed outside the territorial jurisdiction of the United States.' In view of the fact that this opinion (34 Op. Atty. Gen. 257) is limited to aliens working in foreign countries and since the Attorney General indicated that this opinion is not inconsistent with that reported at 25 Op. Atty. Gen. 441, the conclusion seems to be that the Eight-Hour Law is applicable to an American citizen working in a foreign country, provided that the worker otherwise comes within the provisions of the Act.

* * * * * * *

Very truly yours,

DONALD M. MURTHA
Assistant Solicitor."

MICRO
TRADE
CARD
MARK ®

1258

MATTHEW BENDER & COMPANY
MB

48